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No. ——

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,
Respondent.

Petition for a Writ of Certiorari to the Indiana Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A corporation located in state A (the seller's state), having no subsidiaries or affiliates, negotiated and concluded in state B (the market state) several substantial sales of its intangible property, integrally related to its only business, to buyers not domiciled or operating in the seller's state. The questions presented are:

1. Can the seller's state impose an unapportioned tax on the corporation's income from these sales of intangible property solely because the "commercial domicile" of the seller or the "business situs" of the property is deemed to be in the seller's state?

2. Is the income from sales in the market state derived from the corporation's "unitary business" and therefore subject to apportioned taxation by the market state as well as by the seller's state?

3. Does the Commerce Clause impose a more rigorous standard of nexus and relationship than does the Due Process Clause for the market state to exercise taxing jurisdiction with respect to the out-of-state selling corporation making sales in the state?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	10
I. INDIANA'S IMPOSITION OF AN UNAPPORTIONED GROSS INCOME TAX ON THE ENTIRE PROCEEDS OF AN INTERSTATE SALE OF INTANGIBLE PROPERTY, BASED ON THE "DOMICILE" OF THE SELLER OR THE "SITUS" OF THE PROPERTY, CONFLICTS WITH *COMPLETE AUTO, MOBIL* AND THEIR PROGENY	10
II. THE STATE COURT'S UNPRECEDENTED APPLICATION OF THE "UNITARY BUSINESS" CONCEPT TO PRECLUDE A MARKET STATE FROM TAXING A CORPORATION'S SALES IN SUCH STATE CONFLICTS WITH *MOBIL, EXXON* AND *ASARCO* AND DEMONSTRATES THE NEED TO CLARIFY THAT CONCEPT	14
III. THE HOLDING BELOW THAT THE MARKET STATE HAD A SUFFICIENT NEXUS AND RELATIONSHIP TO TAX UNDER THE DUE PROCESS CLAUSE, BUT LACKED SUFFICIENT NEXUS AND RELATIONSHIP UNDER THE COMMERCE CLAUSE, REFLECTS A CONFUSION OF THESE CONSTITUTIONAL PROVISIONS AND CONFLICTS WITH PAST PRECEDENT	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Amerada Hess Corp. v. Director, 490 U.S. 66 (1989) 19
American Home Prods. Corp. v. Limbach, 551 N.E.2d 201 (Ohio 1990) 15
Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 8
ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982) 14-16, 19
Bendix Corp. v. Director, 1991 N.J. LEXIS 72 (N.J. Sup. Ct. July 16, 1991) 16
Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) 12, 19
Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 20
Burnham v. Superior Court, 110 S. Ct. 2105 (1990) 19, 20
Commissioner of Rev. Servs. v. SFA Folio Collection, 59 U.S.L.W. 3838 (U.S. June 18, 1991) 20
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) ..... *passim*
Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983) 13, 18
Curry v. McCanless, 307 U.S. 357 (1939) 10, 13
Department of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941) 4
Dow Chem. Co. v. Director of Rev., 787 S.W.2d 276 (Mo. 1990) 16
Exxon Corp. v. Department of Rev., 447 U.S. 207 (1980) ..... *passim*
F. W. Woolworth Co. v. Taxation & Rev. Dep't, 458 U.S. 354 (1982) 16
Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930) 10
First Nat'l Bank v. Maine, 284 U.S. 312 (1932) 10
Freeman v. Hewit, 329 U.S. 249 (1946) 4, 6, 11
General Motors Corp. v. Washington, 377 U.S. 436 (1964) 18
Goldberg v. Sweet, 488 U.S. 252 (1989) 19

TABLE OF AUTHORITIES—Continued

Page

Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev., 528 N.E.2d 867 (Ind. App. 1988) 2
Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev., 572 N.E.2d 481 (Ind. 1991) .. 1
International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944) 4, 7
International Shoe Co. v. Washington, 326 U.S. 310 (1945) 17, 18
J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) 4, 11
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 11
McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 19
Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948) 18
Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) ..... *passim*
Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 19
National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977) 19
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 17, 18
Pledger v. Illinois Toolworks, Inc., 306 Ark. 134 (1991) 15
Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 19
Shaffer v. Carter, 252 U.S. 37 (1920) 18
Silent Hoist & Crane Co. v. Director, 494 A.2d 775 (N.J. 1985) 16
Standard Pressed Steel Co. v. Department of Rev., 419 U.S. 560 (1975) 19
State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942) .. 10, 13
Trinova Corp. v. Michigan Dep't of Treasury, 111 S. Ct. 818 (1991) 13, 19
Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev., 483 U.S. 232 (1987) 8
Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) 13

TABLE OF AUTHORITIES—Continued

	Page
West Publishing Co. v. McColgan, 328 U.S. 823 (1946)	18
Westinghouse Elec. Corp. v. Tully, 466 U.S. 388 (1984)	12
Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936)	10
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940)	18
CONSTITUTIONAL PROVISIONS:	
Article 1, Sec. 8, cl. 3	*passim*
Fourteenth Amendment, Sec. 1	*passim*
STATUTES AND REGULATIONS:	
26 U.S.C. § 168(f)(8)	3
28 U.S.C. § 1257(a)	2
28 U.S.C. § 2101(c)	2
Ind. Code § 6-2.1-1-2 (1982)	2, 4
Ind. Code § 6-2.1-2-2(a) (1982)	2
Ind. Code § 6-2.1-3-3 (1982)	2
Ind. Admin. Code tit. 45 r. 1-1-49 (1982)	2
Ind. Admin. Code tit. 45 r. 1-1-51 (1982)	2, 5, 6
Ind. Admin. Code tit. 45 r. 1-1-119 (1982)	6, 9
Mass. Gen. L. Ch. 63, Sec. 38	12
N.J. Rev. Stat. § 54:10A-6	12
N.J. Rev. Stat. § 54:10E-6	12
N.Y. Tax Law, § 210	12
Va. Code Ann. § 58.1-406	12
MISCELLANEOUS:	
Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 Vand. L. Rev. 401 (1976)	12
McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L. Rev. 265	20
P-H Allstates Tax Guide ¶ 223	12
Uniform Division of Income for Tax Purposes Act, *reprinted in* P-H Allstates Tax Guide ¶ 3261	12
Warren & Auerbach, *Transferability of Tax Benefits and the Fiction of Safe Harbor Leasing*, 95 Harv. L. Rev. 1752 (1982)	3

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hoosier Energy Rural Electric Cooperative, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Indiana Supreme Court in this case.[1]

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a-11a)[2] is reported at *Hoosier Energy Rural Elec. Coop.*,

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[1] The parties to the proceeding below were the petitioner, as plaintiff-appellant, and the respondent, Indiana Department of State Revenue, as defendant-appellee. Petitioner has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

[2] "App." refers to the Appendix to this Petition.

Inc. v. Indiana Dep't of State Rev., 572 N.E.2d 481 (Ind. 1991). The opinion of the Indiana Tax Court (App. 12a-25a) is reported at *Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev.*, 528 N.E.2d 867 (Ind. App. 1988). The denial of petitioner's claim for refund in this case by the Indiana Department of State Revenue is not reported. It is reprinted at App. 26a-27a.

JURISDICTION

The judgment of the Indiana Supreme Court was filed on May 29, 1991 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This petition is timely filed under 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, Sec. 8, cl. 3 of the United States Constitution provides in relevant part that "Congress shall have Power . . . [t]o regulate commerce with foreign Nations, and among the several States . . . ."

The Fourteenth Amendment of the United States Constitution, Sec. 1, provides in relevant part that "[n]o state shall . . . deprive any person of . . . property, without due process of law."

This case concerns the constitutionality of Ind. Code §§ 6-2.1-1-2, 6-2.1-2-2(a), and 6-2.1-3-3, and of Ind. Admin. Code tit. 45 r. 1-1-49 and 1-1-51, reprinted at App. 28a-33a.

STATEMENT OF THE CASE

Petitioner is an Indiana corporation with its principal office in Indiana, where it operates electric generating facilities. It has no subsidiaries. In 1982 petitioner possessed valuable intangible property rights (federal income tax benefits) that it wished to sell.[3] To maximize

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[3] The property consisted of petitioner's right to claim federal income tax accelerated cost recovery allowances and investment tax

the proceeds from sale of these property rights, which were not as readily or productively marketable in Indiana, petitioner chose to sell them through the New York financial market, uniquely situated to handle such sophisticated transactions.

Petitioner retained as its agent the New York investment banking firm of Goldman Sachs & Co. to identify potential buyers. In New York, Goldman Sachs secured bids on petitioner's behalf from a number of potential purchasers. The best prices were offered by J.C. Penney Co. ("Penney"), a Delaware corporation with its principal place of business in New York, and Amoco Tax Leasing IV Corp. ("Amoco"), a Delaware corporation with its principal place of business in Illinois. Petitioner retained a New York law firm to negotiate and draft on its behalf three complex sale agreements (two with Penney and one with Amoco). All meetings and negotiations occurred in New York, and none in Indiana. Nor were any negotiations conducted from Indiana, whether by telephone or otherwise. The closings were held in New York, where the sale agreements were signed by petitioner's executives, who previously had made several other trips to New York for the negotiations. The proceeds of the three sales, which totalled nearly $200 million,[4] were paid by wire transfers from Penney's and Amoco's non-Indiana banks to petitioner's account with Goldman Sachs in New York. Petitioner then directly transferred substantially all of the proceeds to prepay debt to the

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credits, which, pursuant to the "safe harbor leasing" provisions of § 168(f)(8) of the Internal Revenue Code, 26 U.S.C. § 168(f)(8), could be sold to other corporations by a taxpayer that had sufficient federal taxable income to be able to use the tax benefits productively. *See generally* Warren & Auberbach, *Transferability of Tax Benefits and the Fiction of Safe Harbor Leasing*, 95 Harv. L. Rev. 1752 (1982).

[4] Penney paid to petitioner $65,708,901 and $85,396,418; Amoco paid $42,245,636.

United States. No part of the proceeds was held at any time by banks in Indiana.

While in New York petitioner's executives and agents shared in the benefits and services provided by New York to those who are drawn there to do business. These benefits included police and fire protection, transportation facilities, and regulation of the New York restaurants and hotels that petitioner's representatives used, as well as regulation of the professional services rendered by the New York investment bankers and lawyers that petitioner had engaged.

On its tax return for 1982 petitioner reported the proceeds of the three sales as exempt from the Indiana Gross Income Tax because of the interstate nature of the sales. Petitioner's gross income tax return indicates that its gross receipts from other sources that year were $113,637,977. The Indiana Department of State Revenue disagreed with petitioner's treatment of the proceeds of the three sales and assessed an additional $2,035,406 of tax (plus interest of $954,883) on the full, unapportioned amount of the sales proceeds under the Indiana Gross Income Tax Act, Ind. Code §§ 6-2.1-1-2 *et seq.* (1982),[5] and regulations thereunder, which do not provide for apportionment. Petitioner paid the assessed tax and interest in full (totalling $2,990,290), filed a claim for refund, and, from the Department's denial of that claim (App. 26a), appealed to the Indiana Tax Court. There petitioner contended that imposition of Indiana Gross Income Tax with respect to petitioner's proceeds from the three interstate sales violated the Commerce Clause of the United States Constitution (App. 15a).

On a largely stipulated record, the Tax Court rejected petitioner's Constitutional claims and upheld imposition

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[5] The Act has been before this Court previously. *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Dep't of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941); *International Harvester Co. v. Dep't of Treasury*, 322 U.S. 340 (1944); *Freeman v. Hewit*, 329 U.S. 249 (1946).

of the state's tax on the full, unapportioned amount of the gross income from the three sales (App. 24a). The Tax Court agreed with the Department that the governing Indiana regulations [6] do not require or provide for apportionment of gross income from the interstate sale of intangible property (App. 21a). Rather, they allocate all of a corporation's income from such a sale to Indiana for unapportioned taxation if the corporation has a "commercial domicile" [7] in Indiana or if the intangible property has a "business situs" [8] in Indiana (*id.*). The Tax Court held that in petitioner's case both the domicile of the taxpayer and the situs of the intangibles were in Indiana (*id.*).

The Tax Court sought to distinguish this Court's decisions in *Mobil* and *Exxon* [9]—which called into question the unapportioned allocation of taxable income from intangible property on the basis of fictions such as "commercial domicile" and "business situs"—by asserting that they applied only to "a unitary business" and by declaring that petitioner "is not a unitary business" (App. 23a). However, the Tax Court had concluded earlier in its opinion that petitioner's intangible property and the

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[6] Ind. Admin. Code tit. 45 r. 1-1-51 (1982).

[7] "Generally speaking, a commercial domicile may be viewed as the location of the majority of all the taxpayer's activities or business. The commercial domicile may also be called the 'nerve center' or 'corporate center' of all the business functions of the taxpayer." Ind. Admin. Code tit. 45 r. 1-1-51 (1982) (App. 31a).

[8] "If the intangible or the income derived therefrom forms an integral part of a business regularly conducted at a situs in Indiana, the total gross income derived from the sale . . . of the rights comprising the intangible property . . . will be required to be reported for taxation . . . ." Ind. Admin. Code tit. 45 r. 1-1-51 (1982) (App. 30a).

[9] *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Exxon Corp. v. Department of Rev.*, 447 U.S. 207 (1980).

proceeds derived therefrom formed an "integral part" of petitioner's regularly conducted business (App. 21a). Indeed this latter conclusion was essential for the Court to hold, as it did, that petitioner's proceeds were from the sale of intangible property having its "business situs" in Indiana.[10]

The Tax Court took note of the decision in *Freeman v. Hewit*,[11] where this Court, through differing rationales, held that the Commerce Clause precluded Indiana from subjecting an Indiana domiciliary's sale of intangible property in New York to Indiana's unapportioned tax on gross income. However, the Tax Court rejected the result in *Freeman*, concluding that the rationale for Justice Frankfurter's majority opinion had been undermined by this Court's decision in *Complete Auto Transit, Inc. v. Brady* (App. 19a-20a),[12] even though *Complete Auto* had quoted Justice Rutledge's concurring opinion in *Freeman*[13] with approval and the holding of *Freeman* has never been overruled.[14]

The Tax Court also held that Indiana's imposition of its tax satisfied the requirements of *Complete Auto* (App. 24a). The Tax Court noted that petitioner was an Indiana corporation, and found that the intangible property rights that had been sold were "rooted in" petitioner's

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[10] *See* Ind. Admin. Code tit. 45 r. 1-1-51 (1982).

[11] 329 U.S. 249 (1949).

[12] 430 U.S. 274 (1977).

[13] *Id.* at 280-81.

[14] The holding of *Freeman* is reflected in an Indiana regulation providing that specified sales of intangibles to nonresidents or through securities exchanges in other states are not taxable by Indiana. Ind. Admin. Code tit. 45 r. 1-1-119 (1982). The Tax Court declined to construe the regulation beyond its express terms as applying to the sale of an intangible other than stock (App. 24a).

personal property, also located in Indiana. For the Tax Court, these facts supported a finding that Indiana had the "nexus" required by *Complete Auto* to tax the transaction (App. 20a). The Tax Court determined summarily that the Indiana tax was fairly "related" to services provided by Indiana, such as police and fire protection, and that since nothing in the gross income tax suggested that its burden fell more heavily on out of state business than on local business, the tax did not discriminate against interstate commerce, thus satisfying the "relationship" and "non-discrimination" requirements of *Complete Auto* (*id.*).

With regard to the fair apportionment prong of *Complete Auto*, petitioner urged that the negotiations, closing and transfer of funds in New York furnished sufficient nexus for that state to impose an apportioned tax on these substantial sales of intangible property. As for the risk of multiple taxation posed by a scheme such as Indiana's unapportioned taxation of gross income by domicile or situs, the Tax Court itself observed with regard to the permissibility of a New York tax that "consummation of a transaction within the borders of the . . . state has been held to give the . . . state power to tax," citing *International Harvester Co. v. Department of Treasury* (App. 21a).[15] The Tax Court also assumed that petitioner's connections with New York were sufficient for a New York tax to satisfy due process requirements, and might be sufficient to require petitioner to collect a New York sales tax (App. 22a).[16]

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[15] 322 U.S. 340 (1944). In *Harvester* this Court sustained Indiana's application of the same act involved here to gross income from sales of an out-of-state corporation made outside the state but consummated in Indiana. *Id.* at 345, 348. The Court noted that there could be no question that Indiana could impose a sales or use tax on the transaction, and "if that is the case, there is no constitutional objection to the imposition of a gross receipts tax by the State of the buyer." *Id.* at 345.

[16] The Tax Court seemed to dismiss the multiple tax burdens that New York could impose as "phantom obligations," because they

Nevertheless, the Tax Court concluded that the Commerce Clause would preclude New York from imposing any tax on gross receipts from the sales in New York of intangible property having a business situs outside New York. Concluding more generally, the Tax Court stated that the non-apportionment provided by Indiana law was "fair" apportionment "because Indiana is the only state empowered to tax the gross receipts from an Indiana corporation's sale of intangible property with an Indiana business situs to out-of-state buyers" (App. 24a).

Petitioner appealed to the Indiana Supreme Court, again contending that application of the Indiana Gross Income Tax violated the Commerce Clause (App. 6a, Br. at 2, 21-39).[17] That Court affirmed, stating that it "agree[d] completely" with the Tax Court's decision (App. 10a). The Indiana Supreme Court ruled that the case involved a tax on "the proceeds of an interstate sale. . . ." (App. 1a, 6a), thereby rejecting the Department's contrary contention. However, the Court disagreed with petitioner's assertion that application of an unapportioned tax on income from a corporation's interstate sale of its intangible property is unconstitutional under the Commerce Clause. The Indiana Supreme Court agreed with the Tax Court that the case was governed by the regulation taxing the sale of intangibles on the basis of their "situs" before the sale (App. 10a).

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had not in fact been imposed on these transactions (App. 22a). The Tax Court did not explain how this approach, which the Indiana Supreme Court did not disavow (App. 8a), could be reconciled with the contrary teachings of *Mobil*, where the Court ruled that the constitutionality of Vermont's tax should not depend upon "the vagaries of New York tax policy" and whether New York had in fact imposed a tax on the same income, as it had not in that case. 445 U.S. at 444. *Accord, Armco, Inc. v. Hardesty*, 467 U.S. 638, 645 n.8 (1984); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232, 241-42 (1987).

[17] "Br." refers to petitioner's brief in the Indiana Supreme Court.

The Indiana Supreme Court purported to apply the *Complete Auto* test to determine the permissibility of Indiana's unapportioned tax. Regarding Indiana's nexus, the Court reiterated the Tax Court's determination that petitioner had its commercial domicile in Indiana (App. 7a). The Court continued that, since the intangible property could not exist separately from petitioner, the business situs of the intangible property lay in Indiana as well (*id.*). The Supreme Court affirmed that the operation of the Indiana Gross Income Tax did not discriminate in favor of local commerce (App. 9a), and that, as there was no evidence that the tax was not fairly related to services provided by Indiana, the Indiana tax was consistent with the relationship prong of *Complete Auto* (*id.*).

With regard to the fair apportionment factor of *Complete Auto*, the Indiana Supreme Court noted petitioner's arguments that, based on the contacts between the sale transaction and New York, that state might have power to tax the sale. The Supreme Court stated that it did "not disagree with this reasoning," but found that a New York tax would not pass two of the four prongs of *Complete Auto* (App. 8a). Specifically, according to the Court, a New York tax on the sale of an intangible with a business situs in Indiana would not be fairly related to services provided by New York. Further, the Court found that New York did not have sufficient nexus to tax the transaction (*id.*). Thus, the Indiana Supreme Court held that the unapportioned Indiana tax did not violate the fair apportionment requirement since, in its view, no other state could tax the sales (App. 8a).[18]

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[18] The Supreme Court agreed with the Tax Court's ruling that Ind. Admin. Code tit. 45 r. 1-1-119 was inapplicable (App. 10a).

REASONS FOR GRANTING THE WRIT

I. INDIANA'S IMPOSITION OF AN UNAPPORTIONED GROSS INCOME TAX ON THE ENTIRE PROCEEDS OF AN INTERSTATE SALE OF INTANGIBLE PROPERTY, BASED ON THE "DOMICILE" OF THE SELLER OR THE "SITUS" OF THE PROPERTY, CONFLICTS WITH *COMPLETE AUTO, MOBIL* AND THEIR PROGENY.

In *Complete Auto* the Court concluded that the Commerce Clause requires, *inter alia*, that state taxes on interstate commerce be fairly apportioned. In *Mobil*, this Court sustained Vermont's apportioned tax on intangible income of a corporation that was domiciled in, and whose property had its business situs in, New York. In reaching that conclusion, the Court rejected the taxpayer's claim that upholding the Vermont tax might subject it to multiple taxation because New York, its domiciliary state, could tax all of its intangible income without apportionment.

The Court criticized the archaic notion of a "situs" of intangible property as based on "fictitions" and "talismanic" concepts,[19] and rejected the contention that taxa-

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[19] Decades ago this Court, relying on now-obsolete territorial notions of taxing and judicial jurisdiction, sustained the power of states to impose unapportioned property and inheritance taxes on the basis of "business situs" or "commercial domicile." *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930) (inheritance tax); *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932) (inheritance tax), *overruled, State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942) (stock may be subjected to inheritance tax by more than one state); *Wheeling Steel Corp. v. Fox*, 298 U.S. 193 (1936) (property tax). In the past, many states also relied on "situs" and "domicile" to allocate taxing authority and impose taxes on unapportioned income. The "situs" rationale was used to support unapportioned taxation of sales of intangible property, as under the Indiana taxation scheme. This is in spite of the fact that the situs of intangible property is based upon a fiction, *i.e.*, that such property is located where its owner is located. *See Curry v. McCanless*, 307 U.S. 357, 367 (1939) (taxation by situs "substitute[s] a rule for a reason").

tion by allocation based on situs or domicile was to be preferred over taxation by apportionment.[20] The Court noted that the reasons for allocation to a single situs that may apply to property taxation carry little force with respect to income taxation. Accordingly, the Court assumed "that the State of commercial domicile has the authority to lay *some* tax" on the corporation's income, but that such authority did not preclude other states from taxing that income on a fairly apportioned basis. 445 U.S. at 444-46 (emphasis added).[21] *See also Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979) ("The corollary of the apportionment principle is that no jurisdiction may tax the [interstate] instrumentality in full.").

This court has never sustained an unapportioned tax on the income from an interstate sale of intangible property. The decision below should be reviewed because it conflicts with the principles of *Complete Auto* and *Mobil*

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[20] The same Term the Court similarly rejected the claim that only the "situs" state could tax income from oil exploration and production. *Exxon, supra*, 447 U.S. at 229. The decision in *Mobil* was foreshadowed by *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 442-43 (1979), where the Court similarly criticized the "anachronistic" doctrine announced in early decisions of this Court under which a vessel or other transportation equipment could be taxed only by its "home port." In *Freeman* the Court had earlier criticized the fictional notion of a situs of intangible property when it invalidated Indiana's tax on the gross income from an Indiana domiciliary's sale of securities in New York, holding that the interstate sale of intangible property should be treated like the interstate sale of any other property. 329 U.S. at 258-59.

[21] In *Adams* this Court held the same Indiana Gross Income Tax at issue here unconstitutional as applied to interstate sales of goods by an Indiana manufacturer from its plant in Indiana, because the absence of apportionment subjected interstate commerce "to the risk of a double tax burden to which intrastate commerce is not exposed," even though there was no proof in *Adams* that the market states had also sought to tax the same gross sales. 304 U.S. at 311, 314; *id.* at 328, 332 (Black, J., dissenting).

that income from interstate transactions must be taxed by apportionment, not by allocation based on situs or domicile as provided in the Indiana scheme upheld by the Court below. The persistence of such situs or domicile-based taxing allocation schemes a decade after *Mobil*,[22] and the decision below sustaining Indiana's unapportioned tax, make clear that the premise of *Mobil* has not been clearly understood or acted on by states whose taxing schemes are incompatible with *Mobil*.

The Court has indicated that a purpose of the Commerce Clause is to ensure "tax-neutral decisions" *i.e.*, that states do not affect the flow of interstate commerce by creating tax-based incentives or disincentives for businesses to conduct their operations in one state rather than another.[23] The continued use of situs principles allows some states to attempt to tax intangible income without apportionment, where the state is the domicile of the taxpayer or can claim to be the "situs" of the intangible, while other states apportion all income, including intangible income (*see* p. 12 n. 22, *supra*). Consequently, the continued use of situs as a determinant of taxation is a major source

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[22] Other states require the apportionment of all or most income from intangibles. *See, e.g.*, Mass. Gen. L. Ch. 63, Sec. 38; N.J. Rev. Stat. §§ 54:10E-6; 54:10A-6; N.Y. Tax Law, § 210; Va. Code Ann. § 58.1-406, 408. Allocation of "nonbusiness" income from intangibles to commercial domicile or business situs currently is required by the Uniform Division of Income for Tax Purposes Act ("UDITPA") §§ 4-8, *reprinted in* P-H Allstates Tax Guide ¶ 3261. The UDITPA has been substantially adopted by nearly 20 states. *See Id.* at ¶ 223. This failure on the part of the states to treat intangible income consistently has resulted in use of overlapping income tax bases by states, and in continuing disputes over whether particular items of intangible income are "business" income or "nonbusiness" income. *See, e.g.*, Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 Vand. L. Rev. 401, 411-19 (1976), and footnote 28, *infra*.

[23] *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 331, 336 (1977); *see also Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 406 (1984).

of actual and potential multiple taxation of income from interstate commerce.[24]

By confirming that situs principles are incompatible with the contemporary operations and taxation of interstate business, the Court can readily eliminate a major source of current overlap among state income tax bases, and insure that all income will be taxed according to the principle of fair apportionment. In the event that the Court does not wish to consider the constitutionality of situs principles generally, it is still necessary to review Indiana's application of situs principles in the context of its Gross Income Tax, which does not provide for any apportionment.[25]

As the Court recently noted, it has a particular role to play "as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions." *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. 818, 836 (1991).[26] This is such a case.

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[24] It has long been understood that more than one state may have sufficient contact with intangible property to support taxing jurisdiction. *Aldrich*, *supra*, 316 U.S. at 178; *Curry*, *supra*, 307 U.S. at 367. In this context, complete allocation of intangible income to one state is "inherently arbitrary." *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920).

[25] This is not a case where the taxpayer is complaining merely about the reasonableness of a state's apportionment formula. *Compare Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983). Rather, this case is one in which the taxing state's laws make *no* provision for apportionment of income from interstate sales of intangible property.

[26] In *Mobil*, the Court upheld Vermont's imposition of an apportioned tax on Mobil's dividend income even though "only tiny portions" of the company's sales, payroll or property were there. 445 U.S. at 428-29. In *Trinova* the Court upheld Michigan's imposition of a substantial apportionment of a value added tax based on sales

II. THE STATE COURT'S UNPRECEDENTED APPLICATION OF THE "UNITARY BUSINESS" CONCEPT TO PRECLUDE A MARKET STATE FROM TAXING A CORPORATION'S SALES IN SUCH STATE CONFLICTS WITH *MOBIL*, *EXXON* AND *ASARCO* AND DEMONSTRATES THE NEED TO CLARIFY THAT CONCEPT.

In cases such as *Mobil*, *Exxon* and *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), this Court has applied the concept of a "unitary business" to determine whether a state may tax income from intangible property generated by a corporate affiliate or by business operations not connected with the state, consistently with the Due Process Clause. Where the unitary business concept and due process would permit two or more states to tax a corporation's income, then Commerce Clause principles require that states empowered to tax satisfy the fair apportionment and other requirements of *Complete Auto*.

The Indiana Supreme Court determined here that, because petitioner is an Indiana domiciliary, income from its sale of intangible property in New York could be taxed without apportionment by Indiana, and not at all by New York. The court's judgment was based on the premise that petitioner is not a "unitary business."

That ruling is at odds with this Court's decisions concerning the unitary business principle, which presume that all income of a corporation's business is apportionable. *E.g.*, *Exxon*, *supra*, 447 U.S. at 207. Even if petitioner's three substantial sales of intangible property in New York were not part of a unitary business, however, they then logically would be deemed to be a *separate* busi-

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there even though most of the taxpayer's property and employees were elsewhere. 111 S. Ct. at 826-28, 830. Here, in contrast, the proportion of the taxpayer's sales activity occurring in the market state was much more substantial. The proceeds of the three sales in New York accounted for approximately two-thirds of petitioner's gross sales in the year in question, 1982.

ness, one which was carried on in and had substantial contacts with New York. *See ASARCO*, 458 U.S. at 334-35 (O'Connor, J., dissenting). The ruling that New York could not tax such a separate business is unprecedented and turns the unitary business concept on its head.[27] The ruling below thus provides compelling evidence that the Court needs to clarify that crucial concept.

Most of the cases applying the *Mobil-Exxon-ASARCO* unitary business principle have involved complex corporate structures, and dividend or interest income from subsidiaries or other investments relating to diverse operations around the world. This case involves a single corporation having no subsidiaries and only one business, and the income in issue is not dividends or interest, but the proceeds of a sale—in New York—of property which was found by the courts below to be "integrally related" to that single business. In no case has the Court held or suggested that a corporation having a single business with no subsidiaries is not a unitary business.[28]

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[27] Under this Court's cases concerning the unitary business concept, the taxing state would have had no substantial connection with the income in question if the income were not deemed part of a unitary business. *See ASARCO*, 458 U.S. at 328-30.

[28] In *Mobil*, *Exxon* and *ASARCO*, the Court required that all income from related active business operations be apportioned among the states where such operations were conducted, whether or not the business operations were in one corporate entity or a group of affiliates. The Court, however, has not had the occasion to provide equal clarification regarding the treatment of intangible income generally. Apart from mere state law categorization of such income as "business" or "nonbusiness" income, state courts and taxing authorities have been unsure of the fundamental constitutional requirements for dividing such income among the states. *Compare American Home Prods. Corp. v. Limbach*, 551 N.E.2d 201 (Ohio 1990), *cert. denied*, 59 U.S.L.W. 3244 (Oct. 2, 1990) (nondomiciliary corporation's investment income not apportionable), *and Pledger v. Illinois Toolworks, Inc.*, 306 Ark. 134 (1991) (unitary business principle determines state law classification of income as "business" or "nonbusiness"; nondomiciliary corporation's "normal or passive

In addition to being unprecedented, the decision below reflected a misunderstanding of the unitary-business principle as applied in such cases as *Mobil*, *Exxon* and *ASARCO*. The requirement that income be from a unitary business if it is to be apportioned and taxed by a nondomiciliary state is a threshold requirement of the Due Process Clause, not of the Commerce Clause. *Mobil*, 445 U.S. at 441-42; *Exxon*, 447 U.S. at 225; *ASARCO*, 458 U.S. at 317-18. *Accord*, *F. W. Woolworth Co. v. Taxation & Rev. Dep't*, 458 U.S. 354, 371-72 (1982). Yet the courts below found no due process objection to New York's taxation of the income from sale of petitioner's property in New York. The courts below instead concluded that even an apportioned tax by New York would be precluded by the Commerce Clause because the sale did not involve a unitary business. Given the confusion as to the role of the unitary business principle reflected in the decision below, and the central importance of that concept, the Court needs to clarify it further. In particular, the Court should reverse the determination of the Indiana courts that the unitary business principle precludes a market state's taxation of a seller's income from its sale of intangibles in that market state.

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income" not apportionable under unitary business principle), *with Silent Hoist & Crane Co. v. Director*, 494 A.2d 775 (N.J.) (investment income is part of nondomiciliary corporation's unitary business and must be apportioned), *cert. denied*, 474 U.S. 995 (1985); *Bendix Corp. v. Director*, 1991 N.J. LEXIS 72 (N.J. Sup. Ct. July 16, 1991) (same), *and Dow Chem. Co. v. Director of Rev.*, 787 S.W.2d 276 (Mo. 1990) (interest, royalties and capital gains are subject to apportionment). Some of these problems in applying the Court's unitary business concept to intangible income were foreshadowed in *ASARCO*. 458 U.S. at 331 (O'Connor, J., dissenting).

III. THE HOLDING THAT THE MARKET STATE HAD A SUFFICIENT NEXUS AND RELATIONSHIP TO TAX UNDER THE DUE PROCESS CLAUSE, BUT LACKED SUFFICIENT NEXUS AND RELATIONSHIP UNDER THE COMMERCE CLAUSE, REFLECTS A CONFUSION OF THESE CONSTITUTIONAL PROVISIONS AND CONFLICTS WITH PAST PRECEDENT.

The courts below held that, even though petitioner's sale of intangible property had sufficient connection and relationship so that New York could tax petitioner's income consistently with due process, nevertheless there was insufficient nexus and relationship with New York for such a tax to satisfy the Commerce Clause requirements of *Complete Auto*. This ruling warrants review because it conflicts with decisions of this Court sustaining taxation upon a comparable "nexus" and relationship, and because it affords an opportunity for the Court to give needed clarification whether the *Complete Auto* nexus and relationship requirements under the Commerce Clause are more stringent than the like requirements of the Due Process Clause.

Prior to *Complete Auto*, in its landmark decision in *International Shoe* the Court upheld, against a due process challenge, a market state's authority to impose an unemployment tax on an out-of-state corporation based on its activities in the market state and to require the corporation to defend itself in the market state's courts in a suit by the state to collect the tax. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The opinion made clear that the same minimal contacts and relationship of the taxpayer with the market state were sufficient to sustain both the taxation and the exercise of personal judicial jurisdiction by that state. *Id.* at 321. *Accord*, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 465 (1959) (citing *International Shoe*);

West Publishing Co. v. McColgan, 328 U.S. 823 (1946) (same).[29]

In *Complete Auto*, the Court was not faced with any claim that the state lacked sufficient connection or relationship to impose the challenged tax. To the contrary, the Court repeatedly noted that the taxpayer did *not* claim that its activity being taxed lacked "a sufficient nexus" or relationship with the state. 430 U.S. at 277-78, 287.[30] The Court merely ruled that a state tax on the privilege of doing business is not *per se* unconstitutional, and did not address the content of the "nexus" or relationship requirements it restated, nor whether they were imposed by the Due Process Clause or the Commerce Clause.

The Court has since apparently treated the due process and Commerce Clause nexus or relationship requirements as equivalent,[31] and has indicated "that the *Complete*

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[29] Taxing and judicial jurisdiction principles had been linked by the Court even before *International Shoe*. *See Shaffer v. Carter*, 252 U.S. 37, 41 (1920): "[G]overnmental jurisdiction in matters of taxation as in the exercise of the judicial function, depends upon the power of the State to enforce the mandate of the State by action taken within its borders, either *in personam* or *in rem*."

[30] The Court noted that the requirement of a "substantial nexus" and relationship had been developed in some prior decisions. *Id.* at 279 (citing *Northwestern States; General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940)). However, those decisions did not address nexus and relationship as requirements of the Commerce Clause, but rather relied entirely or equally on the Due Process Clause. *E.g., Northwestern States*, 358 U.S. at 465 (citing *International Shoe*); *General Motors*, 377 U.S. at 437, 438 448 (Commerce Clause and Due Process Clause referred to without distinction); *Memphis*, 335 U.S. at 86; *id.* at 96 (Rutledge, J., concurring) (jurisdiction to tax considered solely as a due process matter); *Penney*, 311 U.S. at 444 (citing only due process considerations).

[31] *Container Corp., supra*, 463 U.S. at 165-66.

Auto test encompasses due process standards." *Amerada Hess Corp. v. Director*, 490 U.S. 66, 79 (1989). *See also id. at* 80-81 (Scalia, J., concurring in judgment); *Trinova, supra*, 111 S. Ct. at 836 (same); *ASARCO, supra*, 458 U.S. at 350 n.14 (O'Connor, J., dissenting). The decision below demonstrates that the Court needs to clarify that *Complete Auto's* Commerce Clause analysis simply encompasses and does not go beyond the requirements of the Due Process Clause.

The decision below also merits review because it conflicts with decisions of this Court which on similar facts have upheld state authority against claims that there was an insufficient nexus or relationship to satisfy the requirements of the Commerce Clause or due process.[32] These decisions support petitioner's contention that New York had jurisdiction to tax its sales. They make clear that where a corporation goes well beyond mere solicitation—by going into a state to take advantage of its specialized markets and services, having its executives and agents negotiate and close several multi-million dollar sales there, and having the proceeds deposited into its bank account there—that state has sufficient nexus and relationship to impose a tax on the seller's income from the sales,[33] just as it would have sufficient nexus and relationship to require the seller to defend in its courts a suit arising out of those sales. *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (negotiation of single insurance contract in state sufficient for state to assert jurisdiction over dispute arising out of contract). *Compare Burnham v. Superior Court*, 110 S. Ct. 2105

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[32] *E.g., Goldberg v. Sweet*, 488 U.S. 252 (1989); *Tyler Pipe, supra*; *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560 (1975); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

[33] Since the turn of the century New York has imposed a transfer tax on interstate and other securities sales in New York without any suggestion that it lacked a nexus for doing so. *Boston Stock Exch., supra*, 429 U.S. at 323 n.6.

(1990).[34] This Court needs to clarify the ground rules on this recurring issue to ensure greater uniformity of decisions. *Cf.* McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L. Rev. 265, 283-6.[35]

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 27, 1991

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[34] As noted in *Burnham* even as to a "transient" person, by visiting a state he " 'avail[s]' himself . . . of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well." *Id.* at 2124-25 (Brennan, J., concurring) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

[35] The due process question presented in this case is different from and broader than that recently presented in *Commissioner of Rev. Servs. v. SFA Folio Collection*, 59 U.S.L.W. 3838 (U.S. June 18, 1991) (No. 90-1627) (White & Blackmun, J., dissenting from denial of certiorari). There the petition presented no conflict, but rather sought a reexamination of the application of settled due process principles to the particular circumstances of a single business, the mail order business.

APPENDICES

INDEX TO APPENDICES

	Page
Appendix A:	
Opinion of the Indiana Supreme Court	1a
Appendix B:	
Opinion of the Indiana Tax Court	12a
Appendix C:	
August 27, 1987 Denial of Refund Claim	26a
Appendix D:	
Ind. Code § 6-2.1-1-2	28a
Ind. Code § 6-2.1-2-2	28a
Ind. Code § 6-2.1-3-3	29a
Ind. Admin. Code tit. 45 r. 1-1-49	29a
Ind. Admin. Code tit. 45 r. 1-1-51	30a

APPENDIX A

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IN THE
SUPREME COURT OF INDIANA

Supreme Court No. 53S00-8904-TA-269

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC.,
Appellant (Petitioner Below),

v.

INDIANA DEPARTMENT OF STATE REVENUE,
Appellee (Respondent Below).

APPEAL FROM THE INDIANA TAX COURT
The Honorable Thomas G. Fisher, Judge
Tax Court No. 53T05-8709-TA-00041

[Filed May 29, 1991]

KRAHULIK, J.

This is a direct appeal from the Indiana Tax Court's decision to uphold the imposition of the State's gross income tax on the proceeds of an interstate sale of federal

income tax benefits. *Hoosier Energy Rural Electric Cooperative, Inc. v. Indiana Department of State Revenue* (1988), Ind. Tax, 528 N.E.2d 867. At issue is whether the Indiana Department of State Revenue ("Department") can collect a state income tax on the proceeds of this interstate sale of federal income tax benefits. Specifically, four issues are presented for review:

1. Whether the Department made a timely tax assessment for purposes of the applicable three year statute of limitations set forth in Ind. Code § 6-8.1-5-2(a);

2. Whether the income derived from this transaction can be taxed by the state of Indiana without violating Ind. Code § 36-2.1-3-3 and the commerce clause of the federal constitution, U.S. Const., art. I, sec. 8, cl. 3;

3. Whether the Tax Court erred in admitting certain evidence; and

4. Whether the Tax Court failed to make special findings of fact pursuant to Ind. Tax Court Rule 10A(2).

In 1982, Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier"), an Indiana corporation, sold its rights to claim certain federal income tax benefits to Amoco Tax Leasing IV Corporation ("Amoco"), a Delaware corporation with its principal office in Illinois and J.C. Penney Company ("Penney"), a Delaware corporation with its principle office in New York City. The pertinent facts underlying this transaction are that Hoosier, pursuant to I.R.C. § 168(f) sold to Amoco and Penney certain federal income tax benefits based upon and arising out of its ownership of personal property located at Hoosier's Indiana generating station. The transaction was structured as a sale-lease back of the property. Title to the property, however, at all times remained with Hoosier. The parties negotiated the value of the tax benefits to be paid "up

front" in cash. The remaining balance due to be paid to Hoosier for the property equalled the lease payments that Hoosier was to pay back to the purchasers—a wash. The total "sales price" of the property was $632,153,389, of which only $196,318,566 (the value of the income tax benefits sold) was actually received by Hoosier in the form of up-front" cash.

The Department originally assessed gross income taxes on the entire sales price of $632,153,389, but, after further discussions with Hoosier, agreed that only the $193,318,566 cash received for the sale of the federal income tax benefits was subject to the state's gross income tax. A second assessment was issued which asesed gross income tax only on this lesser amount. At all times Hoosier has contended that the taxation of the income received from this interstate sale of tax benefits was prohibited by the commerce clause. Nevertheless, Hoosier paid the assessed tax in full, filed its claim for refund, and appealed the Department's denial of the refund claimed.

I. Statute of Limitations

Hoosier contends that the Department's tax assessment was untimely because it was not brought within the applicable three year statute of limitations. Ind. Code § 618.1-5-2(a) provides, in pertinent part, as follows:

> Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or any of the following:
>
> (1) the due date of the return . . . .

The Department actually made two assessments, one within the three year period and one beyond. The pertinent dates are:

September 9, 1983	—date appearing on Hoosier's 1982 tax return;
June 4, 1985	—issuance of the Department's first assessment: $632,153,389; and
March 3, 1987	—issuance of the Department's second assessment: $196,318,566.

The issue is whether the Department's second assessment relates back to the date of the first assessment. The Tax Court held that it did. It based its finding on the theory that the second assessment was merely a reduction of the original assessment. We agree.

The Department sought to tax the income derived from the entire "sale" of equipment, etc., in the first assessment. After various negotiations between the Department and Hoosier, the Department agreed that this sale was subject to the "safe-harbor" provisions of I.R.C. § 168(f) and, therefore, not taxable, but continued to contend that the "up front" money was taxable as gross income. Hoosier continuously argued that this "up front money" was exempt from state taxation because it was income derived from an interstate sale. Thereafter, the Department made a second assessment, this time on the "up-front" money alone. This second assessment occurred more than three years after Hoosier's original state income tax return was filed.

Hoosier contends that the Department's first assessment was for the "sale" of equipment and nothing more. Hoosier argues that this "sale" never took place because title to the equipment remained in Hoosier. Because the "sale" never took place, Hoosier maintains, the Department's first assessment had to be scrapped entirely and a second assessment on the "up-front" money alone had to be made. If there was never a sale of equipment, Hoosier argues, then the value of the federal income tax

benefits could not have been included in the original "sales price." Hoosier relied on Auditor Roark's testimony that, on the first assessment, he initially wanted to tax the "up-front" money rather than the fictitious sale of equipment, but was overruled by his supervisors who instructed him to tax the entire "sale". Moreover, in the second assessment, the entire sales price of the first assessment was deducted and then the price of the federal income tax benefits was added. This, Hoosier maintains, proves that the "up-front" money was not included in the first assessment. From this accounting, Hoosier charges the Department with an untimely assessment of the proceeds derived from the sale of the federal income tax benefits.

Hoosier carries a heavy burden on appeal. Ind. Tax Court Rule 10 provides that this Court "shall not set aside the findings of judgment of the Tax Court unless clearly erroneous, and due regard shall be given to the opportunity of the Tax Court to judge the credibility of witnesses." Here, Hoosier, in reality, is asking us to reweigh the evidence received by the Tax Court. We refuse to do so. Hoosier challenges the credibility of the Department's witnesses and the weight to be given their testimony. Hoosier regards the auditors' claims that the Department intended to include the "up-front" money in the initial assessment as nothing more than "hindsighted intentions" and "opinion evidence." The Tax Court was in the best position to observe the witnesses who worked on these assessments. After considering the record as a whole, we are not convinced that the Tax Court's findings are clearly erroneous or that a mistake was made. Consequently, we refuse to reverse on this issue.

II. Constitutional, Statutory and Regulation Propriety of The Tax

A. *Commerce Clause.*

Hoosier contends that the Department cannot tax the proceeds of this transaction without running afoul of the commerce clause of the federal constitution, U.S. Const., art. I, sec. 8, cl. 3. Hoosier maintains that this interstate sale of federal income tax benefits is exempt from state taxation pursuant to the above-cited statute and the commerce clause. Merely because the sale was made to two out-of-state purchasers does not necessarily mean that the proceeds are *ipso facto* exempt from Indiana state income tax. The United States Supreme Court, in *Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, expressly rejected the proposition that interstate commerce is immune from state taxation and set forth a four-part test to be applied to state tax laws which target income derived from out-of-state sales. This Court, in *Associated Milk Producers, Inc. v. Indiana Department of State Revenue* (1989), Ind., 534 N.E.2d 715, noted, in dictum, the *Complete Auto* four-part test:

> While Indiana's tax regulations, 45 I.A.C. 1-1-119, as a general rule prohibit taxation of income derived from sales to out-of-state buyers, the Commerce Clause does not so long as there is a sufficient nexus to the state, the tax is fairly apportioned, does not discriminate against interstate commerce in favor of local commerce and is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Goldberg v. Sweet*, —— U.S. ——, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989); *Gross Income Tax Division v. P.F. Goodrich Corporation* (1973), 260 Ind. 41, 292 N.E.2d 247. However, this issue has not

been presented on appeal and we therefore do not now decide it.

Associated Milk, 534 N.E.2d at 718.

We believe that the Tax Court correctly decided that *Complete Auto* governs the instant case. Hoosier's reliance on *Freeman v. Hewit* (1946), 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265, and *Indiana Department of State Revenue v. Nebecker* (1953), 233 Ind. 58, 116 N.E.2d 104, *aff'd* (1955), 348 U.S. 933, 75 S.Ct. 354, 99 L.Ed. 731, for the proposition that all income derived from interstate sales is exempt from state taxation, is misplaced. These cases predate *Complete Auto* by thirty-one and twenty-four years, respectively. *Nebecker* was based to a large extent on *Freeman*, a case whose precedental value has been called into question by *Complete Auto*. Accordingly, we believe that *Complete Auto*, not *Freeman* or *Nebecker*, is the preferred case to utilize in determining the constitutionality of the tax.

The question of the constitutionality of this interstate sale of tax benefits therefore must be answered by whether the tax complies with the four-part test set forth in *Complete Auto*.

(1) *Is there a sufficient nexus to the State?*

There can be no doubt but that Hoosier and its property have both its business situs and commercial situs located wholly within the State of Indiana. Hoosier argues that it is the situs of the intangible and not of the taxpayer which should control. The intangible which was sold, federal income tax benefits, cannot exist separate and apart from the taxpayer and property which, with the aid of IRC § 168(f), created the intangible. Therefore, the taxation of this sale complies with the first prong of the *Complete Auto* test.

(2) *Is the tax fairly apportioned?*

This, according to Hoosier, is the Achilles' heel of the Department's argument in favor of the constitutionality of the tax. As a general proposition, a state tax on interstate commerce must be fairly apportioned to prevent excessive taxes on such sale as each state takes its bite out of the interstate transaction as it passes through each taxing state. To avoid this unfair impediment to interstate commerce, the Constitution requires that state taxes on interstate commerce be apportioned according to the relationship of the state to the total transaction. Hoosier points to the fact that here the sale was facilitated by New York investment bankers, that all negotiations for the sale were held in New York, and that the "up-front" money was transferred to Hoosier's New York bank accounts to support its argument that New York might seek to tax the proceeds of this sale. Thus, reasons Hoosier, Indiana should not be allowed to tax the entire sale, but can only tax its portion of the sale. We do not disagree with this reasoning. We also agree with the Tax Court's finding that New York does not present a substantial or real risk of taxation in a constitutional sense. A tax by New York on this sale would not pass two of the *Complete Auto* tests. First, a New York tax on this sale of an intangible with a business situs in Indiana would not be fairly related to services provided by New York. Secondly, New York does not have sufficient nexus to the creation of the intangible to be able to tax its sale. Hoosier has not proven that this sale is exposed to any substantial risk of being taxed by New York or any other state. Therefore, we hold that the evidence supports the conclusion that the imposition of the tax at issue meets the apportionment requirement of *Complete Auto*.

(3) *Does the tax discriminate against interstate commerce in favor of local commerce?*

The state gross income tax does not discriminate against interstate commerce in favor of local commerce. As the Tax Court correctly found, there is nothing in the operation of the tax that places a greater burden on out-of-state taxpayers than is placed on in-state taxpayers.

(4) *Is the tax fairly related to the services provided by the State?*

Obviously, citizens of the State of Indiana are expected to contribute their fair share of the state tax burden which pays for the multitude of services provided to the citizens by the State. There was no evidence presented to the Tax Court which would in any way show that this tax is not fairly related to the services provided by the State. Therefore, this tax on this sale passes the fourth part of the *Complete Auto* test.

By applying the *Complete Auto* test to the facts of this case as found by the Tax Court, we conclude that the Tax Court was correct in deciding that the taxing of Hoosier's sale of its federal income tax benefits complies with the United States Constitution.

B. *Statute*

Hoosier also contends that the tax in this case violates Ind. Code § 6-2.1-3-3 and 45 I.A.C. 1-1-119 and, therefore, cannot stand. Ind. Code § 6-2.1-3-3 provides that gross income derived from business conducted in interstate commerce is exempt from gross income tax "to the extent the State of Indiana is prohibited from taxing that gross income by the United States Constitution." In view of our express holding that this tax, as applied to this sale, is not prohibited by the United States Constitution, we must, necessarily, hold that it does not violate Ind. Code § 6-2.1-3-3.

C. *Regulations*

Hoosier urges us to find that the Department violated its own regulation, 45 I.A.C. 1-1-119, in taxing this sale. Such regulation, entitled "interstate sale of goods to out-of-state buyer" states that sales of stock to non-residents as well as margin transactions and dealings in commodities futures carried on through securities exchanges in other states are examples of sales which are not subject to Indiana gross income tax. We agree with the Tax Court that the Department regulation which specifically deals with intangibles which have their situs in Indiana, 45 I.A.C. 1-1-51, is controlling in this case, not 45 I.A.C. 1-1-119. We also should note that 45 I.A.C. 1-1-119 is premised upon *Freeman v. Hewitt*, *supra*, and *Nebecker*, *supra*, both of which have been distinguished and replaced by *Complete Auto*. For those reasons, we are not convinced that the Department's regulations prohibit the Department from taxing this sale.

We agree completely with the Tax Court's decision that the tax levied in this case is not prohibited by the commerce clause of the United States Constitution or by Indiana statutes or regulations.

III. Admission of Evidence

Hoosier sets forth as error the fact that the Tax Court admitted certain exhibits and testimony into evidence at the *de novo* hearing held by the Tax Court. The basic premise of Hoosier's argument is that the exhibits consisted of audit forms and work papers which were generated and completed in connection with the "first assessment" and, thus, are not relevant to the issue of whether or not the Department's "second" assessment was lawful. As the Tax Court correctly held, the second assessment is merely a reduction in taxation from the first assessment and, therefore, these work papers were relevant and material to the issues being presented at trial.

We agree with this analysis and further point out that the Tax Court, as any other trial court, is allowed a wide range of discretion in the admission or rejection of evidence.

Hoosier also objected to testimony of Department witnesses who were called to interpret and explain the audit workpapers involved in the audit of this sale. The premise of Hoosier's argument was that the best evidence was the papers themselves and that no parole evidence was necessary or proper to explain and interpret these papers. The Tax Court overruled the objections to such testimony and found that such testimony was helpful to the Tax Court in comprehending the audit workpapers. Again, we agree with the Tax Court and, frankly, fail to see how the Tax Court or any other trier of fact could interpret the audit workpapers without the aid of such testimony.

There was no error in the admission of evidence.

IV. Special Findings of Fact

Finally, Hoosier contends that the Tax Court failed to make special findings of fact as required by Ind. Tax Court Rule 10. We disagree. Ind. Tax Court Rule 10 requires that special findings of fact be made, but that it will be sufficient if the findings of fact and conclusions appear within the opinion or memorandum of decision filed by the Tax Court. We find that the opinion of Judge Fisher more than complies with Ind. Tax Court Rule 10 because the findings of fact and conclusions of the Tax Court appear within its written opinion. The requirement of Ind. Tax Court Rule 10 has been met.

We affirm the decision of the Tax Court.

SHEPARD, C.J., DeBRULER, GIVAN and DICKSON, JJ., concur.

APPENDIX B

ATTORNEY FOR PETITIONER:
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ATTORNEY FOR RESPONDENT:
LINLEY E. PEARSON
Attorney General of Indiana
By: JOEL SCHIFF
Deputy Attorney General
219 State House
Indianapolis, IN 46204

IN THE
INDIANA TAX COURT

Cause No. 53T05-8709-TA-00041

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,
Respondent.

APPEAL FROM FINAL DETERMINATION OF
INDIANA DEPARTMENT OF STATE REVENUE

[Filed Sept. 29, 1988]

FISHER, J.

Hoosier Energy Electric Cooperative appeals the final determination of the Indiana Department of State Revenue. Hoosier protested the Department's assessment of gross income tax on the sale-lease back of property. The Department partially sustained the protest, but assessed gross income tax on the sale of federal income tax benefits. Hoosier's protest and subsequent claim for refund of the second assessment was denied by the Department.

Hoosier was an Indiana corporation. It owned and operated the Merom Generating Station, a coal-fired electric generating facility in Sullivan County, Indiana. In 1982, Hoosier sold its rights to claim certain federal income tax benefits to Amoco Tax Leasing IV Corporation, a Delaware corporation with its principal office in Illinois, and J.C. Penney Company, a Delaware corporation with its principal office in New York. The tax benefits consisted of accelerated cost recovery deductions and investment tax credits relating to personal property located at the Merom Generating Station.

The transaction was structured as a sale-lease back of property, whereby Hoosier sold its property to Amoco and Penney, then leased the property back. Unlike a traditional sale-lease back, however, title was never transferred to Amoco and Penney. Title remained at all times in Hoosier. The parties negotiated the value of the tax benefits, to be paid up front in cash. The difference between Hoosier's tax basis in the property and the value of the tax benefits was represented by notes from Amoco and Penney.

Amoco and Penney then leased the property to Hoosier. The amount of rental due on the lease was equal to the amount of principal and interest on the notes. At the end of the lease, Hoosier had the option to buy the property for a nominal amount. The effect of the transaction was thus a complete wash, save the transfer of tax benefits. Congress recognized the transaction as a safe harbor lease under section 201(a) of the Economic Recovery Tax Act (1981), I.R.C. § 168(f), to allow the transfer of tax benefits for the purpose of encouraging capital investment.

Hoosier was audited by the Department for the tax years 1980 through 1983. The Department assessed gross income taxes of $9,443,457 on Hoosier's 1982 "sale" of personal property to Amoco and Penney. Hoosier protested the assessment.

Prior to its hearing, Hoosier's representative contacted the Department by letter. The letter explained that the safe harbor lease did not constitute a sale of property because no transfer of title had occurred, that the parties merely transferred tax benefits, and that the sale of tax benefits was an interstate transaction exempt from state taxation under the commerce clause. Hoosier reiterated its position at the hearing.

The Department's hearing officer agreed that the safe harbor lease did not constitute a sale of property subject to the gross income tax, but he found that the proceeds from the sale of tax benefits were subject to the gross income tax. The Department issued both a letter of findings and a new assessment for $2,035,406 of gross income tax on the sale of tax benefits represented by the up front money paid by Amoco and Penney. Hoosier paid the tax in full. The Department denied Hoosier's claim for refund. This appeal followed.

The issues presented are:

(1) Whether collection is barred by the statute of limitations; and

(2) Whether the interstate sale of tax benefits under an I.R.C. § 168(f) safe harbor lease is exempt from taxation under the commerce clause.

I. Statute of Limitations

Hoosier Energy claims the collection of tax is barred by the statute of limitations because the second assessment, issued March 18, 1987, was not issued within three years of the date the return was filed, as required by IC 6-8.1-5-2(a). The Department claims that the second assessment is a reduction of the original timely assessment, therefore collection is not barred by IC 6-8.1-5-2.

The Department also contends that Hoosier has waived the issue by its failure to raise it in its claim for refund. Hoosier responds that the Department cannot argue

waiver because of its failure to plead waiver in its answer.

Hoosier is correct in asserting that the Department's responsive pleading should have included waiver. Ind. Rules of Procedure, Trial Rule 8(C). Notwithstanding Trial Rule 8(C), the Department's contention is meritless because original tax appeals involving a claim for refund are *de novo* proceedings. IC 6-8.1-9-1(d) (Supp. 1986). The court's scope of review extends beyond issues argued at the administrative level; questions regarding the statute of limitations are no exception.

Hoosier's characterization of the second assessment as one completely unrelated to the original is not persuasive. The "sales price" of the property was $632,153,389. Amoco and Penney paid part of the sales price in cash, amounting to $196,318,566, and the remainder in notes. The amount of the notes equaled the amount of the rental due on the lease when Hoosier "leased back" its own property. The up front money represented the amount the parties negotiated as the value of the tax benefits, constituting the substance of the transaction.

When the Department finally looked to substance over form, it found that only the up front money, or the proceeds from the sale of tax benefits, was subject to tax. In this sense, the second assessment was merely a reduction of the original. Collection is therefore not barred by the statute of limitations.

II. Commerce Clause

Hoosier claims that the sale of tax benefits is an interstate transaction exempt from state taxation under the commerce clause. It argues that the tax falls squarely within the facts of *Freeman v. Hewit* (1946), 329 U.S. 249, and *Indiana Department of State Revenue v. Nebeker* (1953), 233 Ind. 58, 116 N.E.2d 104, *aff'd* (1955), 348 U.S. 933. The Department acknowledges

that the sale is an interstate transaction, but argues that the gross receipts from the sale are subject to state taxation under *Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274.

Hoosier argues *Freeman* is controlling because it has not been overruled and the sale of tax benefits is indistinguishable from the sale of stock in *Freeman*, therefore this court is required to invalidate the tax. The Department argues that *Complete Auto* is controlling because the Supreme Court has rejected the reasoning of *Freeman*. Hoosier responds that even if the underpinnings of *Freeman* were overruled in *Complete Auto*, the result must be the same as it was in *Freeman* because the *Complete Auto* court adopted the reasoning of Justice Rutledge's concurring opinion in *Freeman*.

Prior to World War II, the Supreme Court's taxation decisions under the commerce clause provided interstate businesses with virtual immunity from state and local taxes. Many state taxes were considered "direct burdens" on interstate commerce and were thus considered impermissible under the commerce clause.

The Supreme Court sharply changed its course with the introduction of the multiple tax doctrine in *Western Live Stock v. Bureau of Revenue* (1938), 303 U.S. 250. Under the multiple tax doctrine, interstate businesses were required to pay their share of the state tax burden, but the commerce clause protected them from cumulative tax burdens not borne by local businesses. *Id.* at 258. *Freeman v. Hewit* represented the Supreme Court's temporary reversion to the direct burden analysis. *See* J. HELLERSTEIN, STATE TAXATION: CORPORATE INCOME & FRANCHISE TAXES ¶¶ 4.5-4.8 (1983); Hellerstein, W., *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 38-50 (1987).

In *Freeman*, the taxpayer was the trustee of an estate created by a will of a decedent domiciled in Indiana at

the time of death. The trustee sold securities held by the estate through an Indiana broker, who arranged for the sale of securities on the New York Stock Exchange by New York brokers. Indiana imposed a tax on the gross receipts of the sale.

Justice Frankfurter, writing for the majority, began his analysis of the commerce clause issue: "Our starting point is clear. [T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but *by its own force created an area of trade free from interference by the States.*" *Freeman*, 329 U.S. at 252 (emphasis added). The Court rejected Indiana's arguments that the tax was valid because it neither discriminated against interstate commerce nor subjected the taxpayer to multiple taxation. The Court concluded that the tax constituted a direct burden on interstate commerce and as such, constituted impermissible interference with the freedom of interstate commerce. *Id.* at 257.

Justice Rutledge concurred in the result, but declined to join the majority because they disregarded apportionment and the risk of multiple taxation. *Id.* at 260 (Rutledge, J., concurring). He believed that Indiana had sufficient contacts with the taxpayer to justify the tax under the due process clause, *id.* at 271 n.27, but that the tax was nevertheless invalid because the taxpayer was subject to the risk of multiple taxation since New York had "equally close and important" connections to the taxpayer. *Id.* at 272.

In *Nebeker*, the Indiana Supreme Court addressed the question of whether an Indiana owner's sale of securities on margin through nonresident brokers constituted an interstate transaction except from taxation under the commerce clause. The court found that the only factual difference between *Nebeker* and *Freeman* was that the stock in *Nebeker* was sold on margin; therefore, *Freeman* was controlling and the tax was invalidated. *Nebeker*,

116 N.E.2d at 104. *Nekeker* was later affirmed by the Supreme Court on the authority of *Freeman*. *Indiana Dep't of State Revenue v. Nebeker* (1955), 348 U.S. 933.

The Supreme Court continued to adhere to the multiple tax doctrine, but not without occasional reversion to the direct burden analysis revised in *Freeman*. In 1959, the Court observed that its collection of state tax cases left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 457. Accordingly, the Court put the direct burden analysis forever to rest when it held that a state could impose a fairly apportioned, nondiscriminatory tax on the net income of an out-of-state business engaged exclusively in interstate commerce. *Id.* at 464. In so doing, the Court was compelled to distinguish *Spector Motor Service, Inc. v. O'Connor* (1951), 340 U.S. 602, because in *Spector*, the Court had invalidated a net income tax virtually identical to the one at issue in *Northwestern*. *Spector*, in turn, had relied on the reasoning of *Freeman v. Hewit*. The Court characterized the tax at issue in *Northwestern* as one on net income, while the tax at issue in *Spector* was characterized as one on the privilege of doing business. *Northwestern*, 358 U.S. at 463-64. The only practical difference between the two were the words used by legislatures in the tax statutes.

In *Complete Auto Transit v. Brady*, the Supreme Court reconsidered *Spector*. In beginning its analysis of *Spector*, the Court reexamined *Freeman v. Hewit*, observing that in that case "a direct tax on interstate sales, even if fairly apportioned and nondiscriminatory, was held to be unconstitutional *per se*." *Complete Auto*, 430 U.S. at 280.

Summarizing *Freeman*, the Court pointed out that the decision had been viewed as "a triumph of formalism over substance." *Id.* at 281 (citing P. HARTMAN, STATE

TAXATION OF INTERSTATE COMMERCE 200-04 (1953); Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 COLUM. L. REV. 211 (1947)). Although *Freeman* might have been "the keystone of a movement toward absolute immunity of interstate commerce from state taxation," the Court concluded that the vitality of *Freeman* had been sapped by subsequent decisions narrowing its rule to one of "draftsmanship and phraseology." *Complete Auto*, 430 U.S. at 281. *Spector* was deemed an aberration and was overruled. *Id.* at 289.

The Court noted Justice Rutledge's concurring opinion from *Freeman* with approval, but did not adopt it verbatim. Instead, the Court fashioned a similar test to examine the constitutionality of state taxes under the commerce clause: the tax must be sufficiently connected to the taxing state to justify the tax; it must be fairly related to benefits provided the taxpayer; it must not discriminate against interstate commerce, and; it must be fairly apportioned. *Id.* at 287.

An argument similar to Hoosier's was offered by Washington stevedores challenging the imposition of a business and occupation tax on the gross receipts from stevedoring activities. Relying on *Puget Sound Stevedoring Co. v. State Tax Commission* (1937), 302 U.S. 90, and *Joseph v. Carter & Weeks Stevedoring Co.* (1947), 330 U.S. 422, the stevedores were successful in persuading the Washington Supreme Court to strike down the tax. The United States Supreme Court reversed, holding that *Puget Sound* and *Carter & Weekes* were overruled to the extent that the reasoning therein was contrary to *Complete Auto*. *Department of Revenue v. Association of Washington Stevedoring Cos.* (1978), 435 U.S. 734. The Court also observed:

> That the holding in *Spector* parallels that in *Puget Sound* is demonstrated by the authorities relied upon or provided by both cases in the past. *Spector* relied on *Carter & Weekes*, which reaffirmed *Puget Sound*,

> and upon *Freeman v. Hewit*. *Freeman*, in turn, relied upon *Puget Sound* and *Carter & Weekes* relied upon *Freeman*. Both *Freeman* and *Puget South* relied upon *Galveston H. & S.A.R. Co. v. Texas*, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031 (1908).

Id. at 746 n. 15 (citations omitted).

The underpinnings of *Freeman* are also compromised by *Complete Auto*. The tax in this case must be analyzed within the framework articulated by the Court in *Complete Auto*.

Hoosier is an Indiana corporation. The tax benefits relate to property located in Indiana. Hoosier sold its tax benefits to Amoco, a Delaware corporation with its principal office in Illinois, and Penney, a Delaware corporation with its principal office in New York. The sale was facilitated by New York investment bankers. All negotiations were held in New York. The up front money paid by Amoco and Penney was transferred to Hoosier's New York banks.

A substantial nexus exists between Hoosier, the taxpayer, and Indiana, the taxing state. Hoosier is an Indiana corporation. The tax benefits are rooted in Hoosier's personal property, also located in Indiana. As Justice Rehnquist concluded in *D. H. Holmes Co. v. McNamara* (1988), 108 S.Ct. 1619, 1624, "[t]here is 'nexus' aplenty here."

The tax is fairly related to the services provided by Indiana. Hoosier enjoys a wide variety of benefits, such as police and fire protection. *See, e.g., Commonwealth Edison Co. v. Montana* (1981), 453 U.S. 609, 623-24.

The tax does not discriminate against interstate commerce. Nothing in the operation of the tax suggests that out-of-state business bears a greater burden of the tax than local business. *See, e.g., American Trucking Associations, Inc. v. Scheiner* (1987), 107 S.Ct. 2829, 2840-41.

The parties dispute whether the tax is fairly apportioned. Hoosier contends that the tax is flawed because it is unapportioned, thus subjecting the transaction to the risk of multiple taxation. The Department contends that the tax is fairly apportioned because no other state has jurisdiction to tax Hoosier on the gross receipts from the sale of an intangible with a business situs in Indiana.

Under 45 IAC 1-1-51, gross income from the sale of an intangible is subject to the Indiana gross income tax if the intangible has a "business situs" in Indiana. "If the intangible or income derived therefrom forms an integral part of a business regularly conducted at a situs in Indiana," then the taxpayer has a business situs in Indiana and the gross receipts from the sale of such intangibles are taxable in Indiana. 45 IAC 1-1-51. If "the majority of all the taxpayer's activities or business" are located in Indiana, then the taxpayer has a "commercial domicile" in Indiana and all income from the sale of intangibles is taxable in Indiana, except for an intangible with a business situs outside Indiana. *Id.* Hoosier's only commercial domicile is in Indiana. The business situs of the intangible is in Indiana, since the tax benefits relate to personal property owned and operated by Hoosier in Indiana.

Hoosier has the burden of demonstrating the risk of multiple taxation. *Standard Pressed Steel Co. v. Washington Dep't of Revenue* (1975), 419 U.S. 560, 563. Actual multiple taxation has not been shown, so Hoosier has the burden of demonstrating that Indiana's taxation scheme poses a risk of multiple taxation in a constitutional sense. *See Exxon Corp. v. Wisconsin Dep't of Revenue* (1980), 447 U.S. 207, 229-30.

Hoosier points to the negotiations, closing, and transfer of funds in New York as local incidents giving New York power to tax the same transaction. The consummation of a transaction within the borders of the taxing state has been held to give the taxing state power to tax. *International Harvester Co. v. Department of Treasury* (1944), 322 U.S. 340.

Assuming the activities occuring in New York are sufficient to satisfy the due process clause, Hoosier has not persuaded the court that a New York tax on Hoosier's gross receipts from the sale of an intangible with a business situs in Indiana would be fairly related to services provided by New York. These contacts might be sufficient to require Hoosier to collect sales tax from its customers if any such sales tax existed, but such phantom obligations do not render unconstitutional Indiana's attempt to tax Hoosier's gross income.

The court recognizes that the specific allocation of all income to a single situs is not a preferred division-of-income method. *See Mobil Oil Corp. v. Commissioner of Taxes of Vermont* (1980), 445 U.S. 425, 444-46; *Exxon Corp. v. Wisconsin Dep't of Revenue* (1980), 447 U.S. 207, 227-29. In *Mobil*, the taxpayer claimed it was subject to the risk of multiple taxation because Vermont sought to tax its share of the taxpayer's dividend income, all of which was supposedly subject to taxation by the state of Mobil's commercial domicile. The Court found that no such risk existed because the taxpayer's state of commercial domicile had, at best, the right to tax only a portion of the taxpayer's dividend income. *Mobil*, 445 U.S. 445 (19—).

In *Exxon*, the taxpayer claimed it was subject to the multiple taxation because Wisconsin sought to tax its share of the taxpayer's production income from oil and gas, all of which was hypothetically subject to taxation in the state of actual taxation. The Court found that no such risk existed because the state of production had no exclusive right to tax the production income of a unitary business. *Exxon*, 447 U.S. at 229.

In both *Mobil* and *Exxon*, the Court found that a fictionalized situs for intangible property was not a useful division-of-income-method in the taxation of the net income of a unitary business because the taxpayer's activities with respect to the intangible property involved rela-

tions with more than one jurisdiction. *Mobil*, 445 U.S. at 445; *Exxon*, 447 U.S. at 229-30. Hoosier has not demonstrated that its activities with respect to the intangible property at issue in this case involve significant relations with New York. Hoosier is not a unitary business. In this case, Indiana does not seek to tax the net income of a unitary business, but rather seeks to tax the gross income from a single transaction involving intangible property with strong connections to Indiana. The court is not persuaded that New York presents actual risk of taxation in a constitutional sense.

Hoosier also contends that 45 IAC 1-1-51 is inapplicable because the regulation also states that certain transactions in intangibles are excluded from taxation, such as "sales which are totally nontaxable as transactions in interstate commerce." Hoosier apparently reads this part of the regulation literally so that all interstate transactions in intangibles are wholly nontaxable. Such a reading echoes Justice Frankfurter's free trade view of the commerce clause, *see Freeman*, 329 U.S. at 252; this approach has long since been repudiated. The transaction is not "totally nontaxable" because, under *Complete Auto*, the income is subject to Indiana tax so long as the tax passes constitutional muster.

Hoosier also contends that 45 IAC 1-1-119 is an equally valid regulation covering this transaction. In 45 IAC 1-1-119, the taxability of various interstate sales of goods to out-of-state buyers is indicated. The regulation provides the following transaction is nontaxable:

> Sales of stock to nonresidents made through Indiana or nonresident brokers. See Freeman v. Hewit, 329 U.S. 249 (1946); also margin transactions and dealings in commodities futures carried on through securities exchanges in other states. See Indiana Dep't of State Rev., Gross Income Tax Div. v. Nebecker, 233 Ind. 58, 116 N.E.2d 104 (1953).

45 IAC 1-1-119(1)(e).

The court recognizes that properly promulgated regulations of the Department have the force and effect of law, but cannot construe a regulation grounded in case law which the court has previously found to be of doubtful validity beyond its express terms. The court declines to extend the application of 45 IAC 1-1-119 to the sale of an intangible other than stock because 45 IAC 1-1-51 adequately covers the subject.

In conclusion, the court finds that the Department's collection of tax is not barred by the statute of limitations because the second assessment was a reduction of the original timely assessment. The court also finds that the result in this case is not controlled by *Freeman* and *Nebeker* because the reasoning underlying those cases has been called into doubt by *Complete Auto*. The court finds that the tax passes constitutional muster under the test articulated in *Complete Auto* since the tax is fairly related to services provided by Indiana, is supported by nexus between Hoosier and Indiana, does not discriminate against interstate commerce, and is fairly apportioned. With regard to the last factor, the court finds that the tax is fairly apportioned because Indiana is the only state empowered to tax the gross receipts from an Indiana corporation's sale of intangible property with an Indiana business situs to out-of-state buyers.

Accordingly, it is therefore ORDERED, ADJUDGED and DECREED that the Department's denial of Hoosier's claim for refund is affirmed. Judgment entered for the Department.

ORDERED this 29th day of September, 1988.

/s/ Thomas G. Fisher
THOMAS G. FISHER,
Judge, Indiana Tax Court

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APPENDIX C

STATE OF INDIANA

[SEAL]

DEPARTMENT OF REVENUE
STATE OFFICE BUILDING

INDIANAPOLIS, 46204-2253

August 27, 1987

VIRGIL E. PETERSON
Executive Vice-President
and General Manager
Hoosier Energy Rural Electric Cooperative, Inc.
7398 N. Highway 37 (P.O. Box 908)
Bloomington, IN 47402

Dear Mr. Peterson:

This letter is written in response to the Claim for Refund filed by Hoosier Energy Rural Electric Cooperative, Inc. and received by the Corporate Tax Division of the Indiana Department of Revenue May 7, 1987. Having reviewed the same, the Department finds that no new information or issues exist which will allow the Department to deviate from its findings as originally expounded upon in the Letter of Findings (Number: 85-7511 ITC) issued March 18, 1987.

Gross income is defined in IC 6-2.1-1-2 to include: "all the gross receipts a taxpayer receives: . . . (3) from the sale, *transfer* or exchange of property, real or personal, tangible or *intangible.*" (Emphasis added). The safe harbor leases in question are intangibles. They represent tax benefits which are being transferred from the taxpayer and utilized by other corporations. Although the

sale/leaseback portion of the transaction is fictitious and not taxable, the actual, up-front money *is* a taxable transaction.

The issue of interstate commerce is obviated by the two tests enunciated in 45 IAC 1-1-51 to determine the taxability of income from intangibles. Under the first test of business situs, "if the intangible or the income derived therefrom forms an integral part of business regularly conducted at a situs in Indiana, . . . [it] will be required to be reported for gross income tax purposes.

The facts of the case support both the situs, and the second test relative to commercial domicile. The taxpayer's Claim for Refund is respectfully denied.

Sincerely,

/s/ William L. Tracy
WILLIAM L. TRACY
Deputy Commissioner
Indiana Department of
Revenue

WLT/SLH:jm

APPENDIX D

Indiana Gross Income Tax
Statutory and Regulatory Provisions

Ind. Code § 6-2.1-1-2.

(a) Except as expressly provided in this article, "gross income" means all the gross receipts a taxpayer receives:

(1) from trades, businesses, or commerce;

(2) as admission fees or charges;

(3) from the sale, transfer, or exchange of property, real or personal, tangible or intangible;

(4) from the performance of contracts;

(5) as prizes or premiums;

(6) from insurance policies;

(7) as damages or judgments;

(8) from the investment of capital, including interest, discounts, rentals, royalties, dividends, fees, and commissions;

(9) from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations; and

10) from any other source not specifically described in this subsection.

Ind. Code § 6-2.1-2-2.

(a) An income tax, known as the gross income tax, is imposed upon the receipt of:

(1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and

(2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a

taxpayer who is not a resident or a domicilliary of Indiana.

Ind. Code § 6-2.1-3-3.

Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution.

Ind. Admin. Code tit. 45 r. 1-1-49. Business Situs Defined.

For purposes of these regulations, a taxpayer may establish a "business situs" in ways including, but not limited to, the following:

(1) Use, occupancy or operation of an office, shop, construction site, store, warehouse, factory, agency route or other place where the taxpayer's affairs are carried on;

(2) Performance of services;

(3) Mantenance of an inventory or stocks of goods for sale, distribution or manufacture;

(4) Sale or distribution of merchandise from company-owned vehicles where title to the goods passes at the time of sale or distribution;

(5) Acceptance of orders without the right of approval or rejection in another state;

(6) Ownership, leasing, rental or other operation of income-producing property (real or personal); or

(7) Certain activities of resident salesmen.

If any taxpayer is in doubt as to whether the Department will consider him as having established a tax situs in Indiana or other states, he should contact the Department for a determination. Taxpayers with business activities both within and without the state should

also refer to the regulations on interstate commerce (Regulation 6-2-1-7(a)(010) *et seq.*) and out-of-state business of an Indiana resident (Regulation 6-2-1-1(m)(340)).

Ind. Admin. Code tit. 45 r. 1-1-51. Situs of Intangibles.

The Department applies two tests in determining the taxability of income from intangibles. The term "intangible" or "intangible property," as used in IC 6-2-1-1(m), means and includes notes, stocks in either foreign or domestic corporations, bonds, debentures, certificates of deposit, accounts receivable, brokerage and trading accounts, bills of sale, conditional sales contracts, chattel mortgages, "trading stamps," final judgments, leases, royalties, certificates of sale, choses in action and any and all other evidences of similar rights capable of being transferred, acquired or sold.

The first test is what may be termed the "business situs" of the taxpayer or the relationship of the income from the intangible to the business activity of the taxpayer in Indiana. If the intangible or the income derived therefrom forms an integral part of a business regularly conducted at a situs in Indiana, the total gross income derived from the sale, assignment, transfer or exchange of the rights comprising the intangible property, or from interest, finance charges, dividends or other earnings upon the intangibles of any kind, or from any other source arising from the ownership of intangible property, or from the transfer of ownership to another will be required to be reported for taxation under IC 6-2-1-1(m) at the higher rate under IC 6-2-1-3(g). The test of a "situs" has been defined in Regulation 6-2-1-1(m)(330) and out-of-state business is discussed in Regulation 6-2-1-1(m)(340).

Therefore, if a taxpayer has a "business situs" in Indiana, as defined by Regulation 6-2-1-1(m)(330), and the intangible or the income derived therefrom is connected with that business, either actually or construc-

tively, the gross receipts of those intangibles will be required to be reported for gross income tax purposes.

In addition to the case where the owner of the intangible is doing business in Indiana and the intangibles form an integral part of such owner's business conducted at or through his "business situs" in Indiana, a taxpayer may also be liable for gross income tax from intangibles if he is deemed to have established a "commercial domicile" in Indiana. Thus, the second test is what may be termed the "commercial domicile" of the taxpayer.

A taxpayer may have many business situses, but has only one commercial domicile. Where that is located must be determined based on all of the facts. Generally speaking, a commercial domicile may be viewed as the location of the majority of all the taxpayer's activities or business. The commercial domicile may also be called the "nerve center" or "corporate center" of all the business functions of the taxpayer.

If a taxpayer's commercial domicile is in Indiana, all of the income from intangibles will be taxed under IC 6-2-1-1(m) except that income which may be directly related to an integral part of a business regularly conducted at a "business situs" outside Indiana. The Department will look to the following types of activities and the location of such activities of a taxpayer in determining the "commercial domicile;" however, such list is not all-inclusive:

(1) location of management and administrative activities connected with each location, such as policy and investment decisions;

(2) location of board of directors' meetings;

(3) residence of executives and their offices;

(4) location of books and records;

(5) location of payment on income from intangibles of the taxpayer; and

(6) information from annual and quarterly reports of the taxpayer.

If a commercial domicile is established in a state other than Indiana, no income from intangibles will be taxed under IC 6-2-1-1(m) unless the taxpayer has also established a business situs in Indiana and the intangible income derived therefrom foms an integral part of that Indiana activity.

The physical location of the intangible at the time any income is received under either the "business situs" test or the "commercial domicile" test is not a controlling factor but will be considered in view of all of the facts presented.

With respect to royalty income from such sources as oil, mineral and timber lands, that income will be taxable if the real property is located in the State of Indiana. Royalty income directly related to oil, mineral and timber lands located in states other than Indiana acquires a "business situs" in the other states and is nontaxable under IC 6-2-1-1(m). (See Regulation 6-2-1-1(m) (140).)

The taxability of royalty income from such sources as patents or copyrights is to be determined as other income from intangibles according to the tests outlined previously on the "business situs" of the taxpayer or the "commercial domicile" of the taxpayer.

Examples of transactions in intangibles which are partially or wholly excluded from taxation are: sales which are subject to taxation only on the "gross earnings" basis (IC 6-2-1-1(n)); sales which are totally nontaxable as transactions in interstate commerce (IC 6-2-1-7(a)); sales of, or interest on certain bonds issued by the United States or the State of Indiana (IC 6-2-1-7(a)); sales of promissory notes or retail installment contracts acquired in accordance with specific provisions of IC

6-2-1-1(m) and Regulation 6-2-1-1(m)(290); sales by or interest received by certain exempt organizations (IC 6-2-1-7(i)(1)); the issuance of bonds or stocks, except with respect to treasury stock (IC 6-2-1-1(m)); the redemption, retirement or maturity of bonds or preferred stock (IC 6-2-1-1(m)); transactions between corporations filing consolidated return except as to distributions to a member stockholder from dissolution of another member ((IC 6-2-1-14(a)); or exchange of securities in corporate reorganizations (IC 6-2-1-1(m)).

(2)

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No. _____

IN THE

Supreme Court of the United States

October Term, 1991

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED BY PETITION

Respondent, Indiana Department of State Revenue ("Department") does not accept the question as it is presented by Petitioner, Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier"). The question presented is:

May a State, consistent with the Commerce Clause of the United States Constitution impose a tax upon income derived from the sale of tax benefits relating to property located in Indiana?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED BY PETITION	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING PETITION	4
I. THE SUPREME COURT OF INDIANA MADE A FACT-SPECIFIC DETERMINATION THAT COMES WITHIN THE STANDARDS FOR PERMITTED TAXATION IN ACCORDANCE WITH ANY DECISION OF THIS COURT OR STATE COURT OF LAST RESORT	4
II. THE SUPREME COURT OF INDIANA FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES BEFORE IT	5
CONCLUSION	11

TABLE OF AUTHORITIES

CASES: *Page*

Armco Inc. v. Hardesty, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) 8

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977)..... *passim*

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983)... 9

Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978)..... 4

General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964) 4

Goldberg v. Sweet, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989) ..... *passim*

Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev., 572 N.E.2d 481 (Ind. 1991)..... 2, 7

Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev. 528 N.E.2d 867 (Ind.Tax 1988) . 2

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959)..... 4

Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940)..... 5

CONSTITUTIONAL PROVISIONS:

Article I, Sec. 8, cl. 3..... 2, 4

STATUTES AND REGULATIONS:

26 U.S.C. § 168(f)(8)..... 3, 9

Ind. Code § 6-2.1-1-2 3
Ind. Code § 6-2.1-1-2(a) 8
Ind. Code § 6-2.1-2-2 2
Ind. Code § 6-2.1-2-2(a) 3, 8
Ind. Code § 6-2.1-3-3 3
Ind. Admin. Code tit. 45 r. 1-1-49 3
Ind. Admin. Code tit. 45 r. 1-1-51 3

No. _____

IN THE

Supreme Court of the United States

October Term, 1991

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC., *Petitioner,*

v.

INDIANA DEPARTMENT OF STATE REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Petition for a Writ of Certiorari ("Petition") filed by Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier") seeks review of a 5-0 decision of the Supreme Court of Indiana. That decision held that Indiana's Tax Court correctly decided that *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) governed this case. The Court examined the unique facts of this case involving interstate sale of tax benefits and determined that the tax imposed complied with the four-part test set forth in *Complete Auto*. The imposition of the tax and application of *Complete Auto* was consistent with this Court's view of the application of *Complete Auto* as set forth in *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 603 (1989).

This opposition is based on two grounds:

1. The decision in this cause is fact sensitive, but the Indiana Supreme Court's answer to the question presented comes within the well established standards for permitted taxation. No new substantial issue which requires novel or extensive argument is presented.

2. The key question on which the decision of the cause depends has been previously determined by this Court and the opinions below properly apply this Court's precedent.

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a-11a)[1] is reported at *Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev.*, 572 N.E.2d 481 (Ind. 1991). The opinion of the Indiana Tax Court (App. 12a-25a) is reported at *Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev.*, 528 N.E.2d 867 (Ind.Tax 1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution, Art. I. § 8, cl. 3, provides in pertinent part that "The Congress shall have power . . . to regulate Commerce . . . among the several states . . . ."

Indiana Gross Income Tax, Ind. Code § 6-2.1-2-2, provides in pertinent part:

> (a) an income tax, known as the gross income tax, is imposed upon the receipt of:
>
> (1) The entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana. . . .

Indiana Gross Income Tax, Ind. Code § 6-2.1-3-3 provides:

> Gross income derived from business conducted in commerce between the state of Indiana and either another

[1] "App." refers to the Appendix to the Petition.

state or a foreign country is exempt from gross income tax to the extent the State of Indiana is prohibited from taxing that gross income by the United States Constitution.

This case concerns the application of Ind. Code §§ 6-2.1-1-2, 6-2.1-2-2(a), 6-2.1-3-3 and of Ind. Admin. Code tit. 45 r. 1-1-49 and 1-1-51, reprinted at App. 28a-33a as applied to the proceeds of a sale of tax benefits.

STATEMENT OF THE CASE

Petitioner is an Indiana corporation that owned and operated the Merom Generating Station, a coal fired electric generating facility in Sullivan County, Indiana. Petitioner's only commercial domicile is Indiana. In 1982, Hoosier sold its rights to claim certain federal income tax benefits. The tax benefits consisted of accelerated cost recovery deductions and investment tax credits relating to and inseparable from personal property located at the Merom Generating Station.[2] The sale was facilitated by New York investment bankers.

The Supreme Court of Indiana's opinion sets forth the facts regarding the sale of the safe harbor transactions.[3] Respondent incorporates by reference the facts as stated in the opinion below. The Supreme Court of Indiana thoroughly examined the sale of the tax benefits in light of the Commerce Clause and the *Complete Auto* tests as well as other decisions of this Court.[4]

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[2] The property consisted of petitioner's right to claim federal income tax accelerated cost recovery allowances and investment tax credits, which, pursuant to the "safe harbor leasing" provisions of § 168(f)(8) of the Internal Revenue Code, 26 U.S.C. § 168(f)(8), could be sold to other corporations by a taxpayer that had sufficient federal taxable income to be able to use the tax benefits productively.

[3] App. A to Petition at 2a-3a.

[4] App. A to Petition at 6a-10a.

REASONS FOR DENYING PETITION

I.
THE SUPREME COURT OF INDIANA MADE A FACT-SPECIFIC DETERMINATION THAT COMES WITHIN THE STANDARDS FOR PERMITTED TAXATION IN ACCORDANCE WITH ANY DECISION OF THIS COURT OR STATE COURT OF LAST RESORT

While the issue of interstate commerce and the protection from state taxation which Art. I, § 8, cl. 3 of the United States Constitution provides is unquestionably an issue of substance, in the context of this particular case the issue which Hoosier seeks to have argued is not. This Court has stated the terms and guidelines upon which state taxation of activities within the general flow of interstate commerce will be permitted. This instance of state taxation comes within the standards for permitted taxation, and no substantial issue which requires extensive or novel argument has been raised.

The requirements to sustain the tax are that it is: (1) applied to activity with a substantial nexus with the State; (2) fairly apportioned; (3) not discriminatory against interstate commerce; and (4) fairly related to the services provided by the State. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978); *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959), see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

The Supreme Court of Indiana properly applied the precedents of this Court to the facts before it. Hoosier's suggestion notwithstanding, there is no conflict between the Supreme Court of Indiana's application of precedents of this Court to the facts before it and the application by other state courts of those same precedents to the facts before them.

II.
THE SUPREME COURT OF INDIANA FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES BEFORE IT

Hoosier's attacks on the Indiana Supreme Court decision with regard to "unitary business" and the "Due Process Clause" are misplaced.[5&6] Neither issue, although remotely related,is germane to the outcome of this case.

The Department's imposition of Gross Income Tax on the monies received by Hoosier from the sale of intangible tax benefits complies with the Due Process Clause of the United States Constitution. A transaction that a state seeks to impose tax upon must be within the state's taxing power or jurisdiction. This Court in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267 (1940) stated, ". . . [T]he simple but controlling question is whether the state has given anything for which it can ask return." This Court concluded that irrespective of the fact that the tax was contingent upon events which transpired outside the State, the substantial privilege of carrying on a business in Wisconsin supported the imposition of the tax. *Id.* 311 U.S. at 444-445.

A state seeking to impose its tax on proceeds from activity in interstate commerce must establish a connection or nexus between the exertion of its taxing power and any benefits which it has conferred upon the one sought to be taxed. Indiana has asserted nexus or jurisdiction to tax herein and Hoosier has not contested the assertion.

The Indiana Supreme Court applied the *Complete Auto* test to the case at bar. Notwithstanding, Hoosier's criticism of both Indiana's Tax Court and Supreme Court for adopting the *Complete Auto* test, this Court has continued to recognize Justice Blackmun's test and recently affirmed and applied the same in

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[5] See Petition at 14.

[6] See Petition at 17.

Goldberg v. Sweet, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989).

This Court in *Goldberg* decided that a tax on interstate telecommunications imposed by the State of Illinois did not violate the Commerce Clause. *Id.* 109 S.Ct. at 585. This Court's analysis employed the *Complete Auto* test. This Court found:

> Since the *Complete Auto* decision [1977] we have applied its four-prong test on numerous occasions.[12] We now apply it to the Illinois tax.

Id., 109 S.Ct. at 588.

In reviewing the procedural history of Goldberg, this Court stated:

> It [the trial court] found that *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), and its progeny control this case. *Under the four-prong test originated in Complete Auto, a state tax will withstand scrutiny under the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the service provided by the State."* Id., at 279, 97 S.Ct. at 1079.

(Emphasis added.) *Id.*, 109 S.Ct. at 587.

All parties to the *Goldberg* case had agreed that the first prong of the test had been satisfied because the Illinois tax on interstate telecommunications was being applied to an activity having *substantial nexus* with the State of Illinois, *Id.*, 109 S.Ct. at 588.

The Indiana Supreme Court likewise concluded that the first prong of the *Complete Auto* test was satisfied in the case at bar.[7] Specifically, concluding: " . . . [T]he intangible which was sold, federal income tax benefits, cannot exist separate and apart from the taxpayer and property which, with the aid of

[7] See App. A to Petition at 7a.

IRC § 168(f), created the intangible. . . ." *Hoosier Energy Rural Elec. Coop., Inc. v. Ind. Dept. of State Revenue, supra*, 572 N.E.2d at 485.

This Court in *Goldberg* began its inquiry with apportionment, the second prong of the *Complete Auto* test. The Appellants had argued that the telecommunications tax was not fairly apportioned because Illinois taxed the gross charge of each telephone call pursuant to their statute. *Goldberg v. Sweet, supra*, 109 S.Ct. at 588.

This Court responded to the parties' contentions and stated:

> In analyzing these contentions, we are mindful that *the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction.* See, e.g., Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 169, 103 S.Ct. 2933, 2942, 77 L.Ed.2d 545 (1983). But "*we have long held that the Constitution imposes no single [apportionment] formula on the States,*" Id. at 164, 103 S.Ct. at 2939, *and therefore have declined to undertake essentially legislative task of establishing a "single constitutionally mandated method of taxation.*" Id. at 171, 103 S.Ct. at 2943; see also Moorman Mfg. Co v. Bair, 437 U.S. 267, 278.280, 98 S.Ct. 2340, 2347-2348, 57 L.Ed.2d 197 (1978). *Instead we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent.* Scheiner, 483 U.S., at ____, 107 S.Ct. at ____; Armco Inc. v. Hardesty, 467 U.S. 638, 644, 104 S.Ct. 2620, 2623, 81 L.Ed.2d 540 (1984); Container Corp., supra, 463 U.S. at 169-170, 103 S.Ct. at 2942-2943.

(Emphasis added.) *Id.* "To be internally consistent, . . . a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result." *Id.*, 109 S.Ct. at 589. This Court concluded that the Illinois Tax Act at issue was internally consistent because if every state only taxed the interstate calls charged to an in-state service address, only one state would tax each interstate call. *Id.*

The contentions of the Appellant in *Goldberg* are not unlike those of Hoosier in the case at bar. Hoosier's challenge to Indiana's Gross Income Tax Act is that the tax thereby imposed is not apportioned. The Code provides under IC 6-2.1-1-2(a):

> . . . 'gross income' means all the gross receipts a taxpayer receives:
>
> * * *
>
> (3) from the sale, transfer, or exchange of property, real or personal, tangible or intangible. . . .

The Indiana Code further provides under IC 6-2.1-2-2(a):

> An income tax, known as the gross income tax is imposed upon the receipt of:
>
> (1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana. . . .

In applying the internal consistency test enunciated in *Goldberg*, we must focus: "on the text of the challenged statute and hypothesize a situation where other States have passed an identical statute" to be certain that the tax is fairly apportioned pursuant to the *Complete Auto* test. *Goldberg v. Sweet*, *supra*, 109 S.Ct. at 589.

When we apply the internal consistency test of *Goldberg* and therefore hypothesize other states passing an identical statute, each state would only tax the gross receipts from the sale of tangible or intangible property of its domiciliary corporations. Clearly, if all states were to tax according to Indiana's structure, only Indiana could tax the receipts at issue. When only one state can impose tax on income receipts there is obviously no risk of multiple taxation.[8]

This Court in *Goldberg* rejected an argument that the Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), dictated a different standard for the internal consistency test. *Goldberg v. Sweet*,

[8] See App. A to Petition at 8a.

supra, 109 S.Ct. at 589. The Appellant contended that, under *Armco*, a court must compare the challenged tax to similar, but not identical, taxes imposed by the other states. This Court responded:

> . . . Sprint misreads Armco. If we were to determine the internal consistency of one State's tax by comparing it with slightly different taxes imposed by other States, the validity of State taxes would turn solely on "the shifting complexities of the tax codes of 49 other States." Armco, supra, 467 U.S. at 645, 104 S.Ct. at 2624; see also Moorman, supra, 437 U.S. at 277, n. 12, 98 S.Ct., at 2346, n. 12. In any event, to the extent that other States have passed tax statutes which create a risk of multiple taxation, we reach that issue under the external consistency test. . . .

Id. Citing to *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169-170, 103 S.Ct. 2933, 2942-2943, 77 L.Ed.2d 545 (1983), this Court affirmed:

> The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. . . . We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.

Goldberg v. Sweet, *supra*, 109 S.Ct. at 589.

Herein an examination of the in-state business activity which triggered Hoosier's taxable event was Hoosier's ownership of "qualified property" located in Merom, Indiana. Such property gave rise to the intangible tax benefits which were sold by Hoosier pursuant to 26 U.S.C. § 168(f)(8).

Similarly, this Court in *Goldberg* recognized that the retail purchase of the interstate calls was not a purely local event because activities were triggered in several states. Nonetheless, this Court rejected Appellant's argument that many states could assess a tax on the gross charge of an interstate phone call. In so doing, this Court called into doubt sufficient

nexus on the part of any other state to tax the activity. *Id.* 109 S.Ct. at 589-590. Although this Court in *Goldberg* did recognize the limited possibility of multiple taxation under the facts therein, it stated that such limited possibility was not sufficient to invalidate Illinois' statutory scheme. *Id.* 109 S.Ct. at 590.

In the case at bar, the issue is not whether the tax has a legislatively apportioned-type structure. The Indiana Gross Income Tax does not. The issue is, regardless of the tax structure, does the imposition of the tax in question warrant apportionment between the State of Indiana and any other state.[9]

The focus in this case cannot be on where the agreements were negotiated or executed or the number of hours it took Hoosier to execute the contracts and receive the monies. The focus must instead be on the activity which generated the income. The income was from a sale of intangible tax benefits. The intangible tax benefits which were sold were based upon Hoosier's tangible personal property located in Indiana by operation of federal law. Therefore, just as this Court in *Goldberg* did not require Illinois to apportion its tax on the gross charges of the interstate phone calls at issue, the Indiana Supreme Court correctly ruled that Indiana was entitled to tax the gross receipts received by Hoosier without apportioning the same to any other state.

The Supreme Court of Indiana applied the correct and long established legal standard to the unique factual record of this case. Its resulting unanimous decision was a proper application of the *Complete Auto* test consistent with *Goldberg v. Sweet*, *supra*, which allows taxing of Hoosier's sale of its federal income tax benefits within the parameters of the United States Constitution.[10] Petitioner's claim that the Supreme Court of Indiana incorrectly applied this Court's precedent is in error and does not merit review by this Court.

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[9] See App. A to Petition at 8a.

[10] See App. A to Petition at 9a.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

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PETITIONER'S REPLY MEMORANDUM

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OCTOBER TERM, 1991

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v.

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Respondent.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

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PETITIONER'S REPLY MEMORANDUM [1]

In its opposition ("Opp.") respondent is unable to dispute that the questions presented by the petition are substantial and important, or that there are conflicts in the case law and a need for this Court's guidance on those questions. Instead, respondent attempts to argue that the questions framed in the petition are not really presented in this case, and also attacks strawmen by addressing questions petitioner has not raised.

For example, respondent argues that the Due Process Clause did not preclude Indiana from imposing some tax on the sales of intangible property (Opp. 5), although petitioner has not contended that it does so. The issue is not whether Indiana has authority to impose *some* tax on petitioner's sales of intangible property in New York,

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[1] *See* Rule 29.1 statement at Pet. 1 n.1.

but whether Indiana *alone* may do so and the extent to which it may do so.[2]

Respondent also claims that petitioner has criticized the state courts here "for adopting the *Complete Auto* test" (Opp. 5), but that is not the case. Rather, petitioner challenges the state courts' disregard of or improper application of the principles of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and its progeny, including *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), and *Exxon Corp v. Department of Rev.*, 447 U.S. 207 (1980). Similarly, respondent argues at some length that the Indiana tax satisfies the "internal consistency" requirement discussed in some of this Court's decisions (Opp. 7-8), but petitioner has not argued otherwise.[3]

Under the decision below, interstate sales in New York of intangible property that is part of a taxpayer's unitary business may be taxed on an unapportioned basis solely by Indiana based on the property's "situs," even

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[2] As Justice Stevens noted in *Goldberg v. Sweet*, 488 U.S. 252 (1989), the fact that "one State through which interstate commerce flows may not constitutionally tax such commerce does not mean that another State may make up for the gap, as it were, by taxing its share as well as the first State's share." *Id.* at 270 n.3 (Stevens, J., concurring).

[3] Respondent's invocation of the "internal consistency" doctrine, however, reflects confusion about that doctrine's role. It was developed essentially as a means of assessing "whether a tax is fairly apportioned . . . ." *Goldberg*, 488 U.S. at 261. Indiana's tax is not apportioned at all. Moreover, respondent's reading of *Goldberg* conflicts with this Court's decision in *Mobil*, where the Court held that one state's tax based on commercial domicile was not immune from the need for apportionment to avoid potential multiple taxation through taxation of the same income by a nondomiciliary state. Nothing in *Goldberg* or the other cases cited in *Goldberg* or by respondent indicates any intention to undermine this thrust of *Mobil*, which was cited with approval in *Goldberg*. 488 U.S. at 259-60 nn.11, 12. If anything, respondent's argument demonstrates the need for the Court to clarify the law in this area, a need evidenced by the equal division of the Court in *Ford Motor Credit Co. v. Department of Revenue*, 111 S.Ct. 2049 (1991).

though New York concededly has sufficient nexus with the sales to satisfy due process requirements for taxation thereof. Respondent acknowledges that the Indiana tax does not have "a legislatively apportioned-type structure" (Opp. 10), and does not dispute that the decision below is unprecedented in sustaining an unapportioned tax on gross income from interstate sales of property, based on the "situs" of the property.[4] Respondent simply ignores *Mobil* and other decisions of this Court rejecting taxation based on such fictions as situs (*see* Pet. 10-13).

Respondent asserts in this connection that, in determining the taxing jurisdiction of the market state, the focus of analysis must be on "the activity which generated the income," here conceded by respondent to be "a sale of intangible [property rights]" (Opp. 10). Respondent does not deny that the relevant "activity," *i.e.*, the sale, took place entirely in New York. Instead, respondent abandons its own premise and says in effect that the focus should be on the activity that gave rise to or created the property that was sold (*id.*). Under respondent's view, if a company made a product in Indiana and took it to New York for sale at a specialized market for such property, the gross income would be taxable only by Indiana, and not at all by New York. Respondent cites no authority for such a rule, and this Court's decisions suggest the contrary. *See, e.g., McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957), and cases

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[4] All but abandoning the reasoning of the Indiana Supreme Court, respondent now relies primarily upon *Goldberg*, which the Indiana Supreme Court did not even discuss. But *Goldberg* did not involve fictional situs doctrines; it involved an excise tax, not a gross income tax; and, unlike the Indiana tax, it was legislatively apportioned through a tax credit provision by which "actual multiple taxation is precluded." 488 U.S. at 265. Respondent asserts, erroneously, that "this Court in *Goldberg* did not require Illinois to apportion its tax . . ." (Opp. 10). In fact, based on events in the taxing state, in *Goldberg* this Court "h[e]ld that the Tax Act is fairly apportioned." 488 U.S. at 265. As noted, the Indiana tax is not apportioned at all (Opp. 10).

cited at Pet. 19 n.32. Indeed, respondent's confusion confirms the need for further guidance by the Court in this important area.

As to the questions presented concerning the "unitary business" concept [5] and the nexus requirement under the Commerce and Due Process Clauses,[6] respondent acknowledges that these issues are "related" to this case but asserts that they are not "germane" to the outcome (Opp. 5).[7] However, these issues are plainly germane. Thus, if the Indiana Supreme Court had ruled that the "unitary business" principle did not preclude New York from taxing petitioner's sales of intangible property in New York, the decision below could not stand. The same would be true if the Court below had found not only (as it did) that a tax by New York on such sales would satisfy the nexus and relationship requirements of the Due Process Clause, but also that such a tax would satisfy the similar requirements of the Commerce Clause. These issues are not only germane but dispositive in this case, and respondent makes no effort to contend either that they are not important or that they were correctly decided below. These issues are squarely presented here and merit resolution by this Court.[8]

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[5] *See* Pet. 14-16.

[6] *Id.* at 17-20.

[7] Respondent itself elsewhere raises the issue (Opp. 9-10), which it here denies is present in the case, whether the market state had nexus and relationship sufficient to support imposition of a tax on the instant sales.

[8] The Commerce Clause "nexus" issue presented here is different from and broader than the questions the Court will review in *Quill Corp. v. North Dakota*, No. 91-194, and *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, No. 91-119, which relate to the nexus requirements for state taxation of out-of-state sellers under the Due Process Clause and an Act of Congress. Nevertheless, although decisions in those cases are unlikely to address or resolve the "nexus" question presented here, it would be appropriate for the Court to grant certiorari in this case as well, so as to permit a more comprehensive consideration of related issues.

In sum, both tacitly and explicitly respondent has confirmed that the questions presented merit review.[9] The Court should grant the writ.

Respectfully submitted,

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[9] We note that an unrelated question about the constitutionality of Indiana's taxation of intangibles is presented by the petition in *Felix v. Indiana Dep't of State Rev.*, No. 91-272. *Felix* concerns an entirely different tax, *i.e.*, the (now repealed) Indiana intangible property tax, rather than the gross income tax at issue in the instant case. The Court should grant the present petition regardless of its disposition of the petition in *Felix*.